Supreme Court, U.S.
FILED

941097 DEC 20 1994

OFFICE OF THE CLERK

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOAN V. HARRIS,
Petitioner,

v.

PAUL HIRSH,
Respondent.

Petition for a Writ of Certiorari to the New York Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

DANIEL F. MCCARTHY
DANIEL A. MCCARTHY
36 West 44th Street
New York, NY 10036

MITCHELL M. KRAUS
3 Research Place
Rockville, MD 20850

MARK D. SCHNEIDER
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

1. Whether the "labor contract" preemption doctrine derived from the Railway Labor Act is separate and distinct from the "labor contract" preemption doctrine derived from § 301 of the Labor Management Relations Act?

2. Whether a state law cause of action brought by an employee covered by a collective bargaining agreement is preempted by the Railway Labor Act where the claim as pleaded, and in substance, does not seek to vindicate rights created by that agreement, or require the interpretation or application of the agreement, but the defendant-employer alleges that the agreement's construction is at issue as part of a negating or affirmative defense?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. The Facts	2
B. The Proceedings Below	3
REASONS FOR GRANTING THE WRIT	7
A. The New York Decision Conflicts With This Court's Decision in *Hawaiian Airlines, Inc. v. Norris*	3
B. The State Courts and Federal Courts of Appeals Are Split on the Question Whether Labor Contract Preemption Analysis Is Claim Centered	10
CONCLUSION	16

TABLE OF AUTHORITIES

CASES Page

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 10, 15-16
Capraro v. United Parcel Service, 993 F.2d 328 (3rd Cir. 1993) 12
Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711 (1945) 5, 9
Fox v. Parker Hannifin Corp., 914 F.2d 795 (6th Cir. 1990) 11
Galvez v. Kuhn, 933 F.2d 773 (9th Cir. 1991) 10
Hanks v. General Motors Corp., 859 F.2d 67 (8th Cir. 1988) 12
Hawaiian Airlines, Inc. v. Norris, 114 S. Ct. 2239 (1994) 7-9
Hirras v. National Railroad Passenger Corp., 1994 U.S. App. Lexis 33082 (5th Cir., No. 92-5753, Nov. 22, 1994) 11
Jackson v. Kimel, 992 F.2d 1318 (4th Cir. 1993) ....
Jackson v. Liquid Carbonic Corp., 863 F.2d 111 (1st Cir. 1988) 12
Johnson v. Anheuser Busch, Inc., 876 F.2d 620 (8th Cir. 1989) 12
Laws v. Calmat, 852 F.2d 430 (9th Cir. 1988) 12
Lingle v. Norge Division of Magic Chef Inc., 486 U.S. 399 (1989) 6, 8, 10
Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) 6
Livadas v. Bradshaw, 114 S. Ct. 2068 (1994) ..... *passim*
Local No. 57 v. Bechtel Power Corp., 834 F.2d 884 (10th Cir. 1987) 11
Lorenz v. CSX Transport Inc., 980 F.2d 263 (4th Cir. 1992) 9
Loughry v. Lincoln Bank, 67 N.Y.2d 369 (N.Y. Ct. App. 1986) 13
Magerer v. John Sexton & Co., 912 F.2d 525 (1st Cir. 1990) 12
Melanson v. United Airlines, Inc., 931 F.2d 558 (9th Cir.), *cert. denied*, 112 S. Ct. 189 (1991) 5
Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) 15

TABLE OF AUTHORITIES—Continued

Page

O'Shea v. Detroit News, 887 F.2d 683 (6th Cir. 1989) 11

Utility Workers v. Southern California Edison, 852 F.2d 1083 (9th Cir. 1988) 12

STATUTES

28 U.S.C. § 1257(a) 2

Labor Management Relations Act

29 U.S.C. § 185 ..... 6, 8-9

National Labor Relations Act

29 U.S.C. § 151, *et seq.* 6

Railway Labor Act

45 U.S.C. § 151, *et seq.* ..... *passim*

MISCELLANEOUS

Note, The Need for a New Approach to Federal Preemption of Union Members' State Law Claims, 99 Yale L.J. 209 (1989) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. ——

JOAN V. HARRIS,

Petitioner,

v.

PAUL HIRSH,

Respondent.

Petition for a Writ of Certiorari to the New York Court of Appeals

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Joan V. Harris hereby petitions this Court to issue a writ of *certiorari* to review the judgment of the New York State Court of Appeals in *Harris v. Hirsh*, 83 N.Y.2d 734 (1994).

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 83 N.Y.2d 734, and is reprinted in the appendix to this *certiorari* petition ("Pet. App.") at 1a. The Order of the Supreme Court of New York, Appellate Division, dismissing the complaint, is reported at 196 A.D.2d 425, 601 N.Y.S. 2d 275, and is reprinted at Pet. App. 11a. The judgment of the Supreme Court of New York, Bronx County, after jury trial, in favor of plaintiff, is unreported and is reprinted at Pet. App. 14a. The decision of the Supreme Court of New York, Appellate Division, reinstating plaintiff's case for trial is re-

ported at 161 A.2d 452, and is reprinted at Pet. App. 16a. The judgment of the Supreme Court of New York, Bronx County, granting defendant's motion for summary judgment is unreported and is reprinted at Pet. App. 19a. The order of the New York Court of Appeals denying the motion for rehearing is unreported and is reprinted at Pet. App. 20a.

JURISDICTION

The New York Court of Appeals issued its opinion on June 9, 1994, and its order denying a timely motion for rehearing on September 29, 1994. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Section 1a of the Railway Labor Act, 45 U.S.C. § 151a, provides:

> The purposes of this chapter are: . . . (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation of application of agreements covering rates of pay, rules, or working conditions.

Section 3, First (i), of the Railway Labor Act, 45 U.S.C. § 153 First (i), provides:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board. . . .

STATEMENT OF THE CASE

A. The Facts

Petitioner Joan V. Harris was an employee of Metro-North Commuter Railroad ("Metro North") from 1977 throughout the period in question in this case. During

that time, Harris was represented for purposes of collective bargaining by the Brotherhood of Railway, Airline and Steamship Clerks ("BRAC"), and was covered by a collective bargaining agreement between Metro-North and BRAC.

In July of 1986, the director of Harris' department at Metro North, respondent Paul Hirsh, called Harris into his office and in the presence of two other supervisory personnel, said: "You have a problem. You take drugs. . . . I know a person who is on drugs and you look like one." These remarks were later widely circulated among Harris' co-workers.

The undisputed evidence at the subsequent trial showed that Hirsh's statement was untrue. That evidence showed, too, that at the time he made this statement, Hirsh had been told by Harris' two immediate supervisors that she was *not* taking drugs, and that in summoning Harris to his office and in making his statements, Hirsh had not followed, and, indeed, had not consulted Metro-North's written operating procedures regarding suspected drug abuse.

B. The Proceedings Below

(a) *Lower Court Proceedings:* In 1987 Harris brought a slander action in New York State Supreme Court against Hirsh. Prior to trial, Hirsh moved for summary judgment, on the ground that the statement in question was made in the context of an employer-employee relationship, and so is entitled to a qualified privilege under state law. The trial court granted the motion, but the intermediate state appellate court reversed.

That appellate court reasoned that, assuming *arguendo* that the statements were entitled to a qualified privilege under New York law, the privilege claim could be defeated if the plaintiff could establish that the statements were known to be false at the time they were made, and were motivated by malice. Reviewing the evidence, the court determined that there was evidence a jury could

find persuasive sufficient to establish each of these points, "[i]ndeed, the evidence before us makes it abundantly clear that the statements may well have exceeded the scope of the privilege." Pet. App. 18a. The matter was then remanded to the trial court.

After a trial by jury, the jury returned a verdict in favor of Harris, awarding her $1.2 million in compensatory and punitive damages. The jury found specifically that defendant:

> (1) committed the intentional tort of slander *per se*; (2) was entitled to a qualified privilege as [Harris'] supervisor; (3) abused the qualified privilege he enjoyed; and (4) acted with malice when he defamed her [Pet. App. 3a].

The evidence presented to the jury in the trial leading to that verdict contained only incidental references to the governing labor agreement between Metro North and Harris' collective bargaining representative, BRAC. That evidence bore no relation to any factual or legal predicate to Harris' cause of action. Nor did Hirsh or his counsel rely on any interpretation of that agreement to support any of his defenses to that cause of action.[1] And, no mention was made of the labor agreement in the charge to the jury.

Hirsh moved to set aside the verdict, arguing, *inter alia*, that the slander claim is preempted by the Railway Labor Act. That motion was denied.

---

[1] Specifically, the labor agreement was the subject of the following trial testimony: Both Harris and Hirsh testified to the fact that subsequent to their meeting, Harris filed a grievance under the labor agreement challenging Hirsh's conduct at the meeting. Harris testified further that, subsequent to their meeting, her position was eliminated, that pursuant to the labor agreement she bid into another position at Metro North, and that she could have filed a grievance under that agreement challenging the elimination of her position, but chose not to. Finally, Hirsh testified that at the time of his meeting with Harris, he had not read Metro North's written substance abuse policy then in effect, and that he did not rely on that policy as a justification for the meeting.

On appeal from the resulting judgment, the state intermediate appellate court reversed the order denying the motion to set aside the verdict, and dismissed the complaint. Pet. App. 11a. That court ruled that the state courts lacked subject matter jurisdiction over the dispute because it "is one growing out of a grievance and 'indisputably arises out of the employment relation between the plaintiff and . . . Metro-North.'" Pet. App. 12a (citation omitted). That being so, the allegations "must be considered a 'minor dispute' within the meaning of the RLA and cannot be asserted as a basis for a common law claim." *Id.*

(b) *The New York Court of Appeals' Decision:* On appeal, the New York Court of Appeals affirmed the state intermediate appellate court's preemption ruling. The New York Court reasoned that "[a]ll claims that may properly be characterized as 'minor disputes' are subject exclusively to the arbitration procedures established by the RLA." Pet. App. 4a.

The court below defined minor disputes "expansively" as covering both claims "governed by the precise terms of a collective bargaining agreement, . . . but also those 'founded upon some incident of the employment relation.'" Pet. App. 5a, citing *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711, 723 (1945). This broad understanding of "minor dispute" was required, in the New York Court's view, to further "the congressional purpose of providing a comprehensive federal scheme for the settlement of employer-employee disputes in the railroad industry, without resort to the courts.'" Pet. App. 5a, quoting *Melanson v. United Airlines, Inc.*, 931 F.2d 558, 561, n.1 (9th Cir.), *cert. denied*, 112 S. Ct. 189 (1991).

From these principles the New York Court derived the following rule:

> [A] state defamation action—which typically will not be expressly governed by a specific labor contract term—will be preempted if the disputed statements were made in connection with conduct authorized by

> the governing collective bargaining agreement and concerned matters related to the employment relationship. . . . In other words, where the dispute turns on whether a provision of the collective bargaining agreement created a qualified privilege to discuss certain employment-related matters, and that privilege would serve as the employer's defense to the suit, the terms of the labor agreement are necessarily implicated. In such circumstances, the congressional goal that labor contracts negotiated under federal law receive uniform interpretation will only be furthered where the arbitration board acts as the final arbiter, and not the courts [Pet. App. 6a]

Applying that rule to the facts of this case, that court ruled that the claim here is preempted because

> at the time of the alleged slander, plaintiff was being interviewed regarding her work performance and her possible violation of the substance abuse policy. Thus, the alleged tortious conduct was 'inextricably intertwined' with a work related investigation that defendant Hirsh was authorized to undertake by the terms of the CBA. [Pet. App. 8a]

The New York Court concluded in this regard:

> Along with a number of courts that have addressed the issue, we conclude that the preemptive effect of the RLA is more pervasive than the preemptive effect of the Labor Management Relations Act, 29 U.S.C. § 185 (LMRA or Taft-Hartley Act), or the National Labor Relations Act, 29 U.S.C. § 151 (NLRA or Wagner Act) . . . two federal regulatory schemes with a purpose distinct from that of the RLA. Accordingly, we reject plaintiff's claim that the test for preemption under section 301 of the LMRA established in *Lingle v. Norge Div. of Magic Chef Inc.* (486 U.S. 399 [1988]—whether "resolution of a state law claim *depends upon* the meaning of a collective bargaining agreement" (emphasis added)—governs this case, and decline to apply the holding of *Linn v. United Plant Guard Workers* (383 U.S. 53 [1966])—that a malicious libel suit is not preempted by the NLRA—to this case. [Pet. App. 6a-7a]

At the same time, the court below observed that

> Adjudication of plaintiff's state tort claim would have been imposible without reference to conduct governed by the collective bargaining agreement since, in rendering its verdict, the jury here was required to specifically determine whether defendant's conduct was qualifiedly privileged under the labor contract and whether he exceeded the scope of that privilege. . . . In so doing, the jury necessarily trespassed upon the exclusive authority of the adjustment board to determine the manner in which an employer may enforce company policies. [Pet. App. 8a]

Shortly after the New York Court issued its decision, this Court decided *Livadas v. Bradshaw*, 114 S. Ct. 2068 (1994), and *Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239 (1994). Harris then moved the New York Court to rehear this matter in light of these two decisions. That motion wa[s] summarily denied without opinion. Pet. App. 20a.

REASONS FOR GRANTING THE WRIT

The New York Court of Appeals' decision here issued on June 9, 1994. This Court's *Hawaiian Airlines v. Norris, supra*, decision issued on June 20, 1994. The New York Court's decision, on its face, rests on the expansive Railway Labor Act "labor contract" preemption doctrine *rejected* in this Court's *Hawaiian Airlines* decision. Nonetheless, the New York Court summarily denied without opinion a timely rehearing petition calling *Hawaiian Airlines* to its attention. In this situation, a grant of *certiorari*, a vacation of the judgment below and a remand for reconsideration in light of *Hawaiian Airlines* is, we submit, the proper—and, indeed, the required—course.

In responding to our rehearing petition, the respondent argued that the New York Court's decision could be read as resting on alternative holdings, with the second holding incorporating a particular understanding of the "labor con-

tract" preemption doctrine as stated in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). According to respondent, the New York Court ruled that "plaintiff's defamation action clearly 'depends upon' an interpretation of the collective bargaining agreement and must be pre-empted."

On that reading of the decision below, this case raises the "labor contract" preemption question that has been answered in three conflicting ways by seven federal courts of appeals. In *Livadas v. Bradshaw, supra*, this Court acknowledged this division in the lower court law but did not resolve the conflict, since doing so was not necessary to the proper disposition of that case. And, on that reading, this case calls for this Court's review to resolve this deep-seated conflict over the correct answer to this frequently recurring "labor-contract" preemption question.

A. The New York Decision Conflicts With This Court's Decision in *Hawaiian Airlines, Inc. v. Norris*

In *Hawaiian Airlines*, the Court resolved a split in the state and lower federal courts on the question whether the "labor contract" preemption standard differs in cases governed by the Railway Labor Act and in cases governed by the Labor Management Relations Act. The Court held that the proper preemption standard under the RLA and LMRA is "virtually identical," 114 S. Ct. at 2247, and "adopt[ed] the . . . standard to resolve claims of RLA pre-emption" delineated in an LMRA case, *Lingle v. Norge Div. of Magic Chef Inc., supra*, 114 S. Ct. at 2249.

In so ruling, this Court recognized that prior to *Hawaiian Airlines* some state and lower federal courts held that, while there is no LMRA "labor contract" preemption when the state law claim at issue relies upon "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract," 114 S. Ct. at 2248, RLA preemption is far broader, preempting "all employment-related disputes," *id.* at 2244. In *Hawaiian Airlines*, this Court *rejected* the proposition that the RLA so "broadly pre-empts substantive protections extended by

the States;" instead, said the Court, the RLA, like the LMRA, preempts only disputes "grounded in the collective-bargaining agreement." *Id.* at 2245. In making that judgment, the Court "expressly disavowed any language in *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711 (1945), suggesting" this overly broad view of RLA preemption. 114 S. Ct. at 2245.

The New York Court of Appeals in the instant case adopted and relied upon the precise understanding of RLA "labor contract" preemption that this Court *rejected* in *Hawaiian Airlines*. Indeed, that court invoked the same language in *Burley* that this Court "expressly disavowed," *see* Pet. App. 5a, as well as a federal court of appeals decision expressly overruled by this Court.[2] The New York Court then determined that all claims "founded upon some incident of the employment relation," whether or not they are contract claims, must be deemed preempted. Pet. App. 5a.

In so ruling, the New York Court specifically "reject[ed] plaintiff's claim that the test for preemption under section 301 of the LMRA established in *Lingle* . . . governs this case." Pet. App. 7a. Of course, *Hawaiian Airline*'s precise holding is that "*Lingle* provides the appropriate framework for addressing pre-emption under the RLA, and we adopt the *Lingle* standard to resolve claims of RLA pre-emption." 114 S. Ct. at 2249.

All this being so—and the New York Court of Appeals having denied a timely motion for rehearing calling its attention to this Court's *Hawaiian Airlines* decision—we submit that this case calls for the granting of *certiorari*, and for vacation of the judgment below with a remand to the New York Court for further consideration of this case consistent with *Hawaiian Airlines*.

---

[2] *Compare* Pet. App. 6a (relying upon *Lorenz v. CSX Transp. Inc.*, 980 F.2d 263 (4th Cir. 1992)), *with Hawaiian Airlines*, 114 S.Ct. at 2249, n.9 (identifying *Lorenz* as one of the casse taking the view contrary to that adopted by the Court).

B. The State Courts and Federal Courts of Appeals Are Split on the Question Whether Labor Contract Preemption Analysis Is Claim Centered

In response to our petition for rehearing to the New York Court of Appeals, respondent argued that the New York Court "took full account of" and adopted respondent's alternate argument that "plaintiff's claim was preempted even if the *Lueck/Lingle* standard applied," because "plaintiff's defamation action clearly 'depends upon' an interpretation of the collective bargaining agreement."

On that understanding of the New York Court's decision, that decision is in conflict with the decisions of three federal courts of appeals, and in accord with the decision of four other federal courts of appeals, on a repeatedly recurring federal question that is of major practical significance to the federal labor relations system.

1. In *Livadas v. Bradshaw*, 114 S.Ct. at 2078, n.18, this Court recognized that "disagreements . . . have arisen over the proper scope of [the Court's] earlier decisions" concerning "labor contract" preemption. Neither *Livadas* nor *Hawaiian Airlines* provided a proper litigation occasion for resolution of those disagreements, with the result that the disagreements still obtain. Subject to the point made in Part A above, pp. 8-9, this case provides the appropriate vehicle finally to resolve the most important of those disagreements. And, there can be no doubt that now that the Court has made it plain that there is a single general "labor contract" preemption standard, the time has come to harmonize what has become a "series of often contradictory [post-*Lingle*] decisions, so much so that 'federal preemption of state labor law has been one of the most confused areas of federal court litigation.'" *Galvez v. Kuhn*, 933 F.2d 773 (9th Cir. 1991), quoting *Note, The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L. J. 209 (1989).

The principal disagreement identified by the *Livadas* Court is this: Some of the lower courts have understood

the "labor contract" preemption doctrine to be one directed at assuring that when "a plaintiff's cause of action itself derives from the collective-bargaining agreement (and, by that agreement, belongs before an arbitrator)," that cause of action is one governed by federal labor contract law that preempts state law. *Livadas*, 114 S. Ct. 2078, n.18. On this view, claims that are in substance *breach of labor contract claims*, no matter how pled, must be treated as federal contract claims.

In contrast, as the *Livadas* Court noted, "in other instances, the argument is different in that [preemption is required if] a plaintiff's claim cannot be 'resolved' absent collective-bargaining agreement interpretation, *i.e.*, that a term of the agreement may or does confer a defense on the employer (perhaps because the employee or his union has negotiated away the state law right)." 114 S. Ct. at 2078, n.18.

(i) The Sixth Circuit has perhaps been most emphatic in embracing the first, "claim-centered," analysis, several times reiterating that "[i]t is *irrelevant* to the preemption question whether or not the employer can defend by showing it had the rights under the collective bargaining agreement to do what it did." *O'Shea v. Detroit News*, 887 F.2d 683, 687 (6th Cir. 1989) (emphasis added); *see also Fox v. Parker Hannifin Corp.*, 914 F.2d 795, 800 (6th Cir. 1990) ("a defendant's reliance on a [collective bargaining agreement] term purely as a defense does not result in section 301 preemption."). The Tenth Circuit has also embraced this "claim centered" analysis of "labor contract" preemption.[8]

(ii) In contrast, the Ninth Circuit, in two cases, has held that an employee's state law privacy claim is pre

---

[8] *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 889 (10th Cir. 1987). *Cf. Hirras v. National Railroad Passenger Corp.*, 1994 U.S. App. Lexis 33082, at 11 (5th Cir., No. 92-5753, Nov. 22, 1994) ("if the claim is brought under state law without any reference to the CBA, then it is not preempted").

empted whenever the defendant employer contends that the privacy right is waived by the management rights—or some cognate—clause of the applicable collective bargaining agreement, whatever the merits of that defense. *Utility Workers v. Southern California Edison*, 852 F.2d 1083, 1086-87 (9th Cir. 1988); *Laws v. Calmat*, 852 F.2d 430, 433 (9th Cir. 1988). The First, Third and Eighth Circuits have reached the same conclusion regarding employer defenses raising questions of contract interpretation.[4]

(iii) Still another court has adopted a position in between these two polar positions. Thus, the Fourth Circuit has held that the mere invocation by an employer of a contractually-related affirmative defense is not enough to warrant preemption. Instead, a court faced with such a defense must determine if the defense does in truth require the court to engage in some quantum of contract interpretation, in which case the claim should be preempted. If, however, the defense is pretextual, or merely invokes the contract collaterally to establish that the defendant was not improperly motivated, the claim should not be preempted.[5]

In this aspect of the New York Court of Appeals decision, as noted, that court alligned itself with the First, Third, Eighth and Ninth Circuits and relied on the strongest form of the "employer defense" preemption rationale. For, it is beyond argument that the elements making out a slander claim under New York law may be —and were—established without making any reference to Harris' labor agreement whatsoever. Thus, under the

---

[4] *Capraro v. United Parcel Service*, 993 F.2d 328, 332 (3rd Cir. 1993); *Magerer v. John Sexton & Co.*, 912 F.2d 525, 530-531 (1st Cir. 1990); *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 118 (1st Cir. 1988); *Hanks v. General Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988); *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620, 623 (8th Cir. 1989).

[5] *See Jackson v. Kimel*, 992 F.2d 1318, 1326 (4th Cir. 1993).

"claim centered" approach to labor contract preemption this slander claim would *not* have been preempted.

But, on this aspect of the New York Court's decision, Harris' claim *is* preempted because under New York law defendants in a slander action may assert a qualified defense if the defamatory statements are made in the context of an employee-employer relationship. And, that preemption result follows even though under New York law, that qualified defense is *defeated* if the defendant is found to have acted out of *actual common law malice*, a determination that does not turn on any contract interpretation question.[6]

On this view, a defendant's assertion that its actions were motivated solely by a desire to follow the labor agreement—even when that proper motive assertion is rejected by the jury as untrue—is sufficient to generate preemption. For it is only with regard to that motive issue that "reference to conduct governed by the collective bargaining agreement" is in any way relevant to this case. Pet. App. 8a. Thus, it is on that attenuated basis that employees working under a collective bargaining agreement that does *not*—and could *not*—grant the employer a right to publish malicious slanders for conduct occurring in the workplace, lose their state legal protection against malicious slanders.

This aspect of the decision below, then, is in accord with the decisions of the federal courts of appeals that hold that "labor contract" preemption is required even of otherwise independent state law claims, whenever the employer asserts a *defense* that arguably requires the finder of fact to "mak[e] reference to" a collective bargaining agreement. By the same token, it is wholly at odds with the decisions of the other federal courts of appeals that hold that the "labor contract" preemption doctrine is limited to cases in which plaintiffs attempt to vindicate

---

[6] *See Loughry v. Lincoln Bank*, 67 N.Y. 2d 369, 376 (N.Y. Ct. App. 1986).

what are in truth labor contract rights. And, it is equally at odds with the remaining federal court of appeals that holds that labor contract preemption, at the least, requires an employer defense that rests on an interpretation of the labor agreement that, if accepted, would defeat the plaintiff's claim.

In sum, as *Livadas* recognizes, the federal courts of appeals and the state courts are hopelessly split on whether the "labor contract" preemption doctrine applies whenever the labor agreement is invoked as part of a defense to an employee's independent state law claim. If the Court does not vacate the judgment for the reasons set forth in point A, *supra*, pp. 8-9, it should grant this *certiorari* petition and set this case down for plenary consideration to resolve this conflict.

2. We would be derelict if we did not close with two additional points.

(a) First, the varying understandings of "labor contract" preemption just discussed go to the very essence of the doctrine. The "claim centered" understanding of the doctrine rests on the understanding that the doctrine is, in its essence, a *forum selection* rule that assures that disputes that are in substance contract disputes, no matter how pled, are resolved through arbitration, when that is what the parties intended. Its major consequence is to assure a decision on the merits in the forum chosen by the contracting parties by mutual agreement (or, in the case of the RLA, by operation of law).

In contrast, in its broadest formulation, as in this case, the "labor contract" preemption doctrine is a powerful *substantive* doctrine that wholly eliminates state law protections for unionized workers for harms suffered in the workplace whenever the employer asserts a contractual justification for its conduct, regardless of the legal validity of that justification.

As we have previously shown, the New York Court ruled Harris' slander claim to be preempted solely because the employer asserted as an affirmative defense a proper motive claim that allegedly requires "reference" to the labor agreement. This is so, moreover, even though it is clear that the defense entirely lacks merit, and in any event, does not require the jury to engage in any contract interpretation whatsoever.

That is a potent draught indeed. In a case challenging the legality of conduct that occurred in a unionized workplace, it is nearly always possible for the employer to come up with an affirmative defense that creates a "need" to consult the labor agreement. If that is all that is required to preempt state tort and employee protective laws in the unionized workplace, then in practical terms, unionized workers will be denied all such legal protections.

Such a "labor contract" preemption doctrine is a qualitatively different doctrine than the one recognized by those courts that preempt only contractually-based claims, saving for unionized employees the full protections of the state minimum standard and tort laws that apply in the workplace setting generally.

A single federal preemption doctrine should not, we submit, generate this kind of gross disparity.

(b) Finally, the New York Court's decision, and the preemption doctrine it invokes, surely is wrong. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), makes it clear that it has never been part of Congress' purpose in enacting the federal collective bargaining laws to deprive unionized workers of the protections of state laws that apply across the board to other workers. Instead, the federal labor law was intended to *rest on*, and to *complement*, state laws that also govern the workplace. *Id.* at 751, 756. And, the New York Court's statement to the contrary notwithstanding, the federal collective bargaining laws do "not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law." *Allis-*

Chalmers Corp. v. Lueck, 471 U.S. 202, 212 (1985). As a general matter, the bare assertion that the labor agreement countenances certain conduct simply is no defense to a claim that the conduct violates a state tort or employee protective law.

The New York Court's overly broad view of labor contract preemption goes well beyond anything suggested or fairly encompassed in this Court's decisions in this area. As the *Livadas* Court recently reiterated,

> the preemption rule has been applied *only* to assure that the purposes animating § 301 will be frustrated neither by state laws purporting to determine 'questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow breaches of that agreement,' nor by the parties' efforts to renege on their arbitration promises by 'relabeling' as tort suits actions simply alleging breaches of duties assumed in collective-bargaining agreements. [114 S. Ct. at 2078 (emphasis supplied).]

The New York Court's decision, preempting a state law that poses absolutely no risk of so frustrating the federal scheme of collective bargaining, cannot be squared with *Livadas*.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DANIEL F. MCCARTHY
DANIEL A. MCCARTHY
36 West 44th Street
New York, NY 10036

MITCHELL M. KRAUS
3 Research Place
Rockville, MD 20850

MARK D. SCHNEIDER
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

APPENDICES

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

JOAN V. HARRIS,

Appellant,

v.

PAUL HIRSH,

Respondent.

OPINION OF THE COURT

TITONE, J.

On this appeal, we are called upon to determine whether the trial court lacked subject matter jurisdiction over plaintiff's common-law defamation action because it constituted a "minor dispute" within the exclusive purview of the mandatory grievance-to-adjustment board procedures established by the Federal Railway Labor Act (RLA) (45 USC § 151 *et seq.*). For the reasons that follow, we conclude that plaintiff's State law claim is preempted, and her exclusive remedy lies with the arbitration procedures established under the RLA.

Plaintiff Joan Harris was employed by Metro-North Commuter Railroad (Metro-North) as a crew dispatcher and was a member of the Brotherhood of Railway, Airline and Steamship Clerks (BRAC) collective bargaining unit. The terms of plaintiff's employment were governed by a collective bargaining agreement (CBA) entered into between Metro-North and BRAC. On July 16, 1986, defendant Hirsh, plaintiff's former supervisor, called plaintiff into his office to discuss her work performance. Plaintiff alleges that during that encounter, and in the presence

of plaintiff's two immediate supervisors who were invited to attend the meeting, defendant Hirsh asked plaintiff whether she had a problem, and then stated to her: "You take drugs. I've worked in the Towers, and I know a person who is on drugs and you look like one. I've been thinking about sending you for a drug test." During the meeting, defendant Hirsh also indicated that he was suspicious that plaintiff used drugs because on a prior occasion he had observed her give an "incoherent" answer to a co-worker who had posed a question. Defendant's remarks were eventually circulated among plaintiff's coworkers.

By letter dated August 7, 1986, plaintiff requested that the BRAC district chair institute an investigation and grant her an "unjust treatment" hearing pursuant to rule 52 of the CBA [1] to determine whether defendant's conduct during the July 16 meeting violated company policy and procedure.[2] Plaintiff thereafter commenced this slander action in State court, alleging that defendant's false and defamatory words damaged her reputation and caused her to suffer mental anguish and physical injuries. Defendant Hirsh asserted as affirmative defenses that the court lacked subject matter jurisdiction over the defamation claim because it was preempted by the mandatory arbitration provisions set forth in the RLA, and that defendant's comments were made in the context of a supervisor-employee interview and were thus subject to a qualified privilege.

At the commencement of trial, defendant moved to dismiss the complaint on the jurisdictional ground. Su-

---

[1] Rule 52, entitled "Unjust Treatment," provides: "An employee who considers himself[/herself] unjustly treated except for discipline matters shall have the * * * right of investigation, hearing on appeal and representation * * * if written request which sets forth the employee's complaint is made to his[/her] supervising officer within thirty (30) calendar days of cause of complaint."

[2] Although plaintiff was granted that hearing on administrative appeal, it has been postponed pending the conclusion of this action.

preme Court denied the motion. To support plaintiff's claim at trial that defendant knowingly uttered false statements about plaintiff's purported drug use, plaintiff introduced uncontradicted testimony that her two immediate supervisors had previously told defendant, in response to his inquiry, that plaintiff was not on drugs. Plaintiff also introduced three documents as exhibits: the Metro-North substance abuse policy, her August 7, 1986 letter requesting a rule 52 unjust treatment hearing, and a letter written by defendant on February 12, 1987 informing her that her position had been abolished. Thereafter, the jury returned a verdict in favor of plaintiff, finding specifically that defendant (1) committed the intentional tort of slander per se, (2) was entitled to a qualified privilege as her supervisor, (3) abused the qualified privilege he enjoyed, and (4) acted with malice when he defamed her. The jury awarded plaintiff $1.2 million in compensatory and punitive damages. Defendant moved to set aside the verdict, again arguing Federal preemption. The motion was denied.

The Appellate Division reversed the order denying the motion to set aside the verdict and dismissed the complaint. The Court concluded that the trial court lacked subject matter jurisdiction by virtue of Federal preemption. In so holding, the Court determined that the allegations raised in plaintiff's State law complaint must be considered "a 'minor dispute' within the meaning of the RLA" because the claim "is one growing out of a grievance and 'indisputably arises out of the employment relation between the plaintiff and * * * Metro-North' " (196 AD2d 425, 426, quoting *Angelo v Metro-N. Commuter R. R.*, 193 AD2d 525). We now affirm.

Congress enacted the RLA (45 USC §§ 151-163) to stabilize labor-management relations in the rail and air carrier industries and to ensure uniform application of Federal law in the interpretation of labor agreements (*Atchison, Topeka & Santa Fe Ry. Co. v Buell*, 480 US 557, 562 [1987]). The act establishes a comprehen-

sive scheme for the orderly and prompt resolution of disputes between covered carriers and their employees that could potentially interrupt service and affect the Nation's commerce (*Union Pac. R. R. Co. v Sheehan*, 439 US 89, 94 [1978]). To achieve the congressional goal of "keeping railroad labor disputes simple and out of the reach of the often lengthy court process" (*Grote v Trans World Airlines*, 905 F2d 1307, 1309 [9th Cir], *cert denied* 498 US 958 [1990]), the RLA gives the National Railroad Adjustment Board, or an adjustment board jointly established by the employer and the representative unions (*see*, 45 USC § 153 [First] [i]; [Second]) primary and exclusive jurisdiction to resolve what have been termed "minor disputes" between covered carriers and their employees (*Elgin, Joliet & E. Ry. Co. v. Burley*, 325 US 711, 723 [1945]). "Minor disputes," statutorily defined as all "disputes between an employee * * * and a carrier * * * growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" (45 USC § 153 [First] [i], are subject to binding and compulsory arbitration under the RLA (45 USC § 153).[3]

All claims that may properly be characterized as "minor disputes" are subject exclusively to the arbitration procedures established by the RLA, even if the disputes could otherwise provide the basis for State tort remedies (*Magnuson v Burlington N.*, 576 F2d 1367 [9th Cir], *cert denied* 439 US 930 [1978]). Thus, a plaintiff cannot circumvent the RLA's mandatory dispute resolution provisions by recharacterizing or disguising a minor dispute as one grounded on State common law (*Lorenz v CSX Transp.*, 980 F2d 263, 268 [4th Cir 1993]; *Magnuson*, 576 F2d 1367, 1369, *supra*).

---

[3] By contrast, "major disputes" involve claims arising from the negotiation or formation of the collective bargaining agreement itself, and are not subject to the grievance-to-arbitration dispute resolution procedures (*see, Burley*, 325 US 711, 723, *supra*).

To prevent an aggrieved employee from avoiding the mandatory RLA arbitration provisions, the courts have defined preempted "minor disputes" expansively (*Consolidated Rail Corp. v Railway Labor Executives*, 491 US 299, 307 [1989]). A dispute will clearly be deemed "minor" within the meaning of the RLA when "the terms of an existing agreement either establish or refute the presence of a right to take the disputed action" (*id.*, at 305). However, the fact that a claim is not expressly governed by precise terms of a collective bargaining agreement is not fatal for purposes of RLA preemption. Minor disputes will include not only claims concerning "the meaning or proper application of a particular [CBA] provision," but also those "founded upon some incident of the employment relation," although not expressly covered by a contract term (*Burley*, 325 US 711, 723, *supra*). A commonly followed restatement of the governing inquiry is that the RLA grievance provisions will preempt State tort actions when the underlying claims are "based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the R.L.A." (*Magnuson*, 576 F2d 1367, 1369, *supra.*)

The purpose of defining "minor disputes" broadly is clear: "[i]f the pleading of emotional injury permitted aggrieved employees to avoid the impact of the R.L.A., the congressional purpose of providing a comprehensive federal scheme for the settlement of employer-employee disputes in the railroad industry, without resort to the courts, would be thwarted" (*Magnuson*, 576 F2d 1367, 1369, *supra*, cited in *Melanson v United Air Lines*, 931 F2d 558, 561, n. 1, *cert denied* —— US ——, 112 S Ct 189 [1991]). In other words, an employee should not be permitted to disguise or restate a genuine contract claim in terms of tort or to extract parasitic tort claims from an employment-related grievance to obtain remedies outside of those contemplated by the RLA.

It follows from those principles that a State defamation action—which typically will not be expressly governed by a specific labor contract term—will be preempted if the disputed statements were made in connection with conduct authorized by the governing collective bargaining agreement and concerned matters related to the employment relationship (*see, Gay v Affourtit*, 1993 WL 438923, 2 [US Dist Ct, SD NY 1993 [libel action preempted where collective bargaining agreement between airline and aircraft crew members must be consulted to determine whether crew had qualified privilege to report misconduct of pilot, even if reports turn out to be false and defamatory]). In other words, where the dispute turns on whether a provision of the collective bargaining agreement created a qualified privilege to discuss certain employment-related matters, and that privilege would serve as the employer's defense to the suit, the terms of the labor contract are necessarily implicated. In such circumstances, the congressional goal that labor contracts negotiated under Federal law receive uniform interpretation will only be furthered where the arbitration board acts as the final arbiter, and not the courts. The State law claim may survive, however, if "the alleged defamation becomes distanced from the work-place and is only 'peripherally' concerned with federal labor law" (*Lorenz v CSX Transp.*, 980 F2d 263, 267 [4th Cir 1992], *supra; see also Rosemond v National R. R. Passenger Corp.*, 1986 WL 10711 [US Dist Ct, SD NY 1986]).

Along with a number of courts that have addressed the issue, we conclude that the preemptive effect of the RLA is more pervasive than the preemptive effect of the Labor Management Relations Act, 29 USC § 185 *et seq.* (LMRA or Taft-Harley Act), or the National Labor Relations Act, 29 USC § 151 *et seq.* (NLRA or Wagner Act) (*see, Lorenz v CSX Transp.*, 980 F2d 263, 268, *supra; Melanson v United Air Lines*, 931 F2d 558, 562, *supra; Grote v Trans World Airlines*, 905 F2d 1307, 1309-1310 [9th Cir 1990]; *DeTomaso v Pan Am. World*

Airways, 43 Cal 3d 517, 528, 733 P2d 614 (1987]), two Federal regulatory schemes with a purpose distinct from that of the RLA *(see generally, Andrews v Louisville & Nashville R. R. Co.*, 406 US 320, 323 [1972]). Accordingly, we reject plaintiff's claim that the test for preemption under section 301 of the LMRA (29 USC § 185) established in *Lingle v Norge Div. of Magic Chef* (486 US 399 [1988])—whether "resolution of a state-law claim *depends upon* the meaning of a collective bargaining agreement" (*supra*, at 405-406 [emphasis added])—governs this case, and decline to apply the holding of *Linn v Plant Guard Workers* (383 US 53 [1966])—that a malicious libel suit is not preempted by the NLRA—to this case.

We also reject, as a creative attempt " 'to evade the mandatory arbitration provisions of the [RLA]' " any suggestion that the preemptive effect of the RLA does not apply to suits, such as this one, brought by an employee against a co-worker in an individual capacity *(Henegar v Banta*, 817 F Supp 668, 672 [ND Ohio 1993], quoting *Gray v Chessie Sys.*, 588 F Supp 1334, 1337 [D Md 1984]; *see also, Gay v Affourtit*, 1993 WL 438923, 3 [US Dist Ct, SD NY 1993], *supra; Gonzalez v Northwest Airlines*, 201 NJ Super 422, 427-428, 493 A2d 547). The claimed distinction between suits brought against the carrier and those brought against an employee individually ignores the explicit language of the RLA which provides that "*any disputes*" (45 USC § 153 [First] [j]) "concerning rates of pay, rules, or working conditions" are to be promptly settled by the established arbitration procedures (45 USC § 153 [First] [i] [emphasis added]). It also ignores the RLA's legislative history, which indicates that Congress "intended to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failure of *managers and employees* to settle peaceably their controversies" (HR Rep No. 328, 69th Cong., 1st Sess 1 [emphasis added]).

Applying the aforementioned principles, we conclude that plaintiff's slander action is preempted and the trial court lacked subject matter jurisdiction to entertain it. The substance of plaintiff's claim is that defendant falsely accused her of drug use during the July 16 meeting and failed to comply with the negotiated policies and procedures governing such inquires. At the time of the alleged slander, plaintiff was being interviewed regarding her work performance and her possible violation of the substance abuse policy. Thus, the alleged tortious conduct was "inextricably intertwined" with a work-related investigation that defendant Hirsh was authorized to undertake by the terms of the CBA *(see, Magnuson*, 576 F2d 1367, 1369, *supra)*. Accordingly, the defamation action is a preempted "minor dispute" *(see, Lorenz*, 980 F2d, at 268, *supra; Magnuson*, 576 F2d 1367, *supra; cf., Rosemond v National R. R. Passenger Corp.*, 1986 WL 10711 [SD NY 1986], *supra)*.

The State action against defendant "in essence and substance" concerned the application or interpretation of company rules embodied in Metro-North's CBA *(see, Carson v Southern Ry. Co.*, 494 F Supp 1104, 1110 [D SC 1979]). Adjudication of plaintiff's State tort claim would have been impossible without reference to conduct governed by the collective bargaining agreement since, in rendering its verdict, the jury here was required to specifically determine whether defendant's conduct was qualifiedly privileged under the labor contract and whether he exceeded the scope of that privilege *(see, Choate v Louisville & Nashville R. R. Co.*, 715 F2d 369, 372 [7th Cir 1983]). In finding that defendant did not have the authority under the collective bargaining agreement to engage in the exchange with plaintiff in the manner that he did, the jury had to second-guess whether defendant Hirsh conducted the investigation of plaintiff within the dictates of the labor agreement. In so doing, the jury necessarily trespassed upon the exclusive authority of the adjustment board to determine the manner in which an employer may enforce company policies.

The risk to be avoided by the provisions for the board's exclusive jurisdiction—that a State court ruling may be inconsistent with a Federal adjustment board determination on the same employment issue—is present here. Notably, plaintiff claimed at trial that defendant Hirsh knew that his statements were false—and thus were maliciously uttered—because plaintiff's two immediate supervisors previously told defendant that plaintiff did not use drugs. However, the terms of the Metro-North substance abuse policy authorize a supervisor to proceed with an employee substance abuse investigation by relying "solely on evidence of behavior, personal observations, or other evidence customarily relied upon in investigations or hearings." Thus, plaintiff's theory that defendant's reliance upon his own observations here constituted malice could well be seen as unsustainable in light of the terms of the agreement which permit such conduct.

The trial record also supports defendant's contention that plaintiff's tort action constituted a preempted "disguised" contract claim. As additional proof of defendant's malice, plaintiff introduced, over objection, a letter written to her by defendant some six months after the July 16 meeting notifying her that her position had been abolished. Plaintiff's reliance upon this document at trial suggests that through the "disguised" State tort defamation action, plaintiff interjected into the litigation the claim that she was "unjustly treated" and ultimately "forced out" of her position—matters entrusted to the sole jurisdiction of the adjustment board under the RLA *(see, Carson v Southern Ry. Co.*, 494 F Supp 1104, 1112, *supra)*.

Finally, the contention that preemption of State tort claims by the RLA penalizes railway workers for being governed by a collective bargaining agreement lacks merit. The grievance-to-arbitration procedures made available to employees governed by the RLA provide a valuable benefit, albeit different from the relief that may be obtained through judicial intervention: a ready forum to promptly resolve employment-related disputes and redress griev-

ances without any cost of litigation to the employee *(see, Union Pac. R. R. Co. v Sheehan*, 439 US 89, 94, *supra)*. In any event, the determinative inquiry is not whether an employee could obtain more favorable relief in State court, but whether the dispute is "minor" within the meaning of the RLA and the grievance procedure established by the RLA is intended by Congress to be the plaintiff's exclusive remedy, as it is here *(see, Magnuson*, 576 F2d, at 1369-1370, *supra; United Airlines v Superior Ct.*, 234 Cal App 3d 1085, 1091, 286 Cal Rptr 159 [1991]).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Judges SIMONS, BELLACOSA, SMITH, LEVINE and CIPARICK concur; Chief Judge KAYE taking no part.

Order affirmed, with costs.

APPENDIX B

SUPREME COURT OF NEW YORK
APPELLATE DIVISION
FIRST DEPARTMENT

JOAN V. HARRIS,

Respondent,

v.

PAUL HIRSH,

Appellant.

Judgment, Supreme Court, Bronx County (Hansel McGee, J.), entered May 7, 1992, which, after jury trial, awarded plaintiff $1,205,420, and order, same court and Justice, entered February 22, 1993, which denied defendant's motion to set aside the verdict, unanimously reversed, on the law, without costs, and the complaint dismissed. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

The parties were employees of Metro-North Commuter Railroad ("Metro-North"), defendant a supervisor and plaintiff a crew dispatcher. The complaint alleges that on July 16, 1986, in the presence of two intermediate supervisors, defendant asked if plaintiff had a problem and suggested that she might be taking drugs. Plaintiff then brought this action for slander. Defendant in his answer pleaded, among his defenses, lack of subject matter jurisdiction, arguing that the slander claim was preempted by the Railway Labor Act (RLA; 45 USC § 151 *et seq.*). Justice Anita Florio dismissed that defense on November 23, 1987. Defendant, however, denied having been served with the order and, on April 1, 1992, after jury selection,

moved for dismissal on the same grounds. Justice McGee found no preemption and denied the motion.

An objection to subject matter jurisdiction may be taken at any stage of an action, including on appeal (*Marine Midland Bank v Bowker*, 89 AD2d 194, 195-196, *affd* 59 NY2d 739; *Matter of Anthony J.*, 143 AD2d 668, 669). Whether or not Justice McGee was bound by Justice Florio's order as the law of the case, this Court may reverse his order if it is substantively incorrect (*Post v Post*, 141 AD2d 518, 519). It is substantively incorrect.

In *Angelo v. Metro N. Commuter R. R.* (193 AD2d 525), this Court held that pursuant to the RLA the State common-law remedies which might otherwise be invoked were preempted. There, a Metro-North policeman had been accused of stealing and, after a disciplinary hearing, was found guilty and dismissed from the force. On appeal to the Railroad Adjustment Board, however, the Board Referee held that the misconduct had not been proved. The policeman was ordered reinstated. He then brought an action in the State court for malicious prosecution; but this Court dismissed his complaint, holding that the dispute between the parties was a " 'minor dispute' " within the meaning of the statute, and was "to be resolved exclusively by means of the procedures set forth in the Act" and that State common-law remedies which might otherwise be invoked were preempted (193 AD2d, *supra*, at 527-528).

As in *Angelo*, the dispute here is one growing out of a grievance and "indisputably arises out of the employment relation between the plaintiff and * * * Metro-North" (*supra*, at 527); despite the allegation of irregularities in the disciplinary process, any misfeasance is no less related to the collective bargaining agreement, and the allegations thereof must be considered a "minor dispute" within the meaning of the RLA and cannot be asserted as a basis for a common-law claim. Nor is the discharge of the em-

ployee or the filing of formal charges a prerequisite for preemption.

Since the State courts lack subject matter jurisdiction, the remaining questions raised by defendant need not be considered. Concur—Milonas, J. P., Rosenberger, Rubin and Nardelli, JJ.

APPENDIX C

SUPREME COURT
STATE OF NEW YORK
COUNTY OF BRONX

Index No. 8065/87

JOAN V. HARRIS,

Plaintiff,

-against-

PAUL HIRSH,

Defendant.

The issues in this action having been duly tried before the Honorable Hansel L. McGee, and a jury, at an IAS Term, Part 5 of this Court, held at the Bronx County Courthouse from March 24, 1992, to April 23, 1992, and the plaintiff, JOAN V. HARRIS, having duly appeared by her attorneys, Graham, Campaign & McCarthy, P.C., and the defendant, PAUL HIRSH, having duly appeared by his attorney, Jose Rios, Esq., and the jury having rendered a verdict on the 23rd day of April, 1992 in favor of the plaintiff, and against defendant, for damages in the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS in compensatory damages and SEVEN HUNDRED THOUSAND ($700,000.00) DOLLARS in punitive damages, and the plaintiff's costs and disbursements having been duly taxed by the Clerk in the sum of One Thousand Two Hundred Twenty ($1,220.00) DOLLARS.

Now on motion of Graham, Campaign & McCarthy, P.C., attorneys for plaintiff, it is

Adjudged that plaintiff, JOAN V. HARRIS, residing at 434 Poplar Street, Bridgeport, Connecticut 06605, re-

cover of the defendant, PAUL HIRSH, residing at 46 Thompson Avenue, Croton-on-Hudson, New York 10520, the sum of ONE MILLION-TWO HUNDRED THOUSAND ($1,200,000.00) DOLLARS, together with interest thereon from April 23, 1992 in the sum of Forty-Two Hundred ($4,200.00) DOLLARS, and with costs and disbursements as taxed in the sum of One Thousand Two Hundred Twenty ($1220.00) DOLLARS, making in all the sum of One Million Two Hundred and Five Thousand, Four Hundred Twenty ($1,205,420.00) DOLLARS, and that the plaintiff, JOAN V. HARRIS have execution therefor.

Judgment signed May 7, 1992.

/s/ [Illegible]
Clerk

APPENDIX D

SUPREME COURT OF NEW YORK
APPELLATE DIVISION
FIRST DEPARTMENT

JOAN V. HARRIS,

Appellant,

v.

PAUL HIRSH,

Respondent.

Order, Supreme Court, Bronx County (Anita Florio, J.), entered November 9, 1988, which granted defendant-respondent's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, and summary judgment denied, without costs.

Plaintiff, an employee of Metro-North Commuter Railroad (Metro-North) from 1977 to 1986, brought this action alleging slander against defendant, the head of her department. The gravamen of the complaint is that, on July 16, 1986, without cause, defendant called her into his office and, in the presence of two supervisors, stated "[y]ou have a problem. You take drugs. * * * I know a person who is on drugs and you look like one." Plaintiff further asserted that no precautions were taken to ensure that these statements were not repeated.

Defendant subsequently moved, pursuant to CPLR 3212, for summary judgment, claiming qualified privilege, in that the statements were made in the context of an employer-employee relationship. Plaintiff duly and vigorously opposed the motion. Included with plaintiff's op-

position papers were excerpts of defendant's and plaintiff's deposition testimony, the negative results of plaintiff's drug tests, and affidavits of fellow employees to the effect that defendant's accusations had spread to the other employees of her department. A copy of Metro-North's Operating Procedures and Directives was also submitted, in order to demonstrate that defendant did not follow proper procedures and policy regarding suspected drug abuse. Plaintiff also contends that the two supervisors had advised defendant that she did not use drugs. As additional proof of malice, plaintiff submitted a copy of a letter dated February 12, 1987, from defendant to plaintiff, which was subsequent to the date plaintiff commenced the within action, by which he abolished her job.

The IAS court granted summary judgment dismissing the complaint, stating, *inter alia*, that the statements were made under circumstances which entitled defendant to the defense of qualified privilege and, further, that plaintiff failed to raise an issue of fact as to whether the statements were made maliciously, thereby vitiating the defense. Plaintiff now appeals.

Summary judgment dismissing a complaint, while a drastic remedy, is properly granted where there are no material issues of fact. (*See*, CPLR 3212.) Thus, the focus is upon issue finding, rather than issue determination. (*Marshall, Bratter, Greene, Allison & Tucker v. Mechner*, 53 AD2d 537 [1st Dept 1976].) Plaintiff asserts that there are hotly contested issues of fact which should be determined by a jury.

In analyzing whether there are triable issues of fact, we are aware that the law confers a qualified privilege on a statement where it " 'is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where the interest is concerned.' " (*Toker v Pollak*, 44 NY2d 211, 219 [1978], quoting *Lovell Co. v. Houghton*, 116 NY 520, 526.) The defense of qualified privilege

may be invoked when a defendant's acts were for a proper purpose and exercised in a reasonable manner; however, it "is forfeited if the defendant steps outside of the scope of the privilege, or abuses the occasion." (Prosser and Keeton, Torts, at 832 [5th ed].)

Assuming, arguendo, that defendant's statements are qualifiedly privileged, the burden of proof falls upon plaintiff to set forth evidence that defendant was motivated by malice. (*Garson v Hendlin*, 141 AD2d 55, 63 [2d Dept 1988], *lv denied* 74 NY2d 603; *Shulman v Anderson Russell Kill & Olick*, 117 Misc 2d 162, 169 [Sup Ct, NY County 1982].) Accordingly, plaintiff must demonstrate that the allegedly defamatory statements were known to be false at the time they were made to sufficiently raise a triable question of fact for the jury. (*O'Rorke v Carpenter*, 55 NY2d 798 [1981].)

Upon our review of the instant record, we conclude that plaintiff has submitted evidentiary proof that defendant knew in advance of the subject incident that plaintiff was not "on drugs". Moreover, we believe that plaintiff may succeed in convincing a jury that defendant's statements were made in furtherance of an improper purpose. Indeed, the evidence before us makes it abundantly clear that the statements may well have exceeded the scope of the privilege. Plaintiff is entitled to have a jury resolve these questions. In reversing the IAS court, we now give her that opportunity. Concur—Murphy, P. J., Carro, Milonas, Asch and Wallach, JJ.

APPENDIX E

[Filed Nov. 3, 1988]

SUPREME COURT
STATE OF NEW YORK
COUNTY OF BRONX

Index No. 8065/87

Justice Florio

JOAN V. HARRIS,

Plaintiff,

-against-

PAUL HIRSH,

Defendant.

ORDER

Upon defendant's motion for summary judgment to dismiss the complaint, and plaintiff having appeared in opposition, upon all the pleadings and papers filed herein, and after due consideration of all arguments in support or opposition thereto, it is hereby ordered that:

Defendant's motion is granted in its entirety and the complaint is dismissed.

Oct. 31, 1988

/s/ AF
ANITA FLORIO
Justice, Supreme Court
Bronx County

APPENDIX F

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of September 1994

Present, HON. RICHARD D. SIMONS,
Senior Associate Judge, presiding

Mo. No. 940

JOAN V. HARRIS,

Appellant,

v.

PAUL HIRSH,

Respondent.

A motion for reargument to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Chief Judge Kaye took no part.

/s/ Donald M. Sheraw
DONALD M. SHERAW
Clerk of the Court

No. 94-1097

JAN 19 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOAN V. HARRIS,

Petitioner,

—v.—

PAUL HIRSH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD K. BERNARD
CAROL S. BARNETT
METRO-NORTH COMMUTER RAILROAD
347 Madison Avenue
New York, New York 10017
(212) 340-2537

CHARLES S. SIMS
(Counsel of Record)
WENDY H. SCHWARTZ
JEFFREY M. LUBELL
PROSKAUER ROSE GOETZ & MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3475

Attorneys for Respondent

January 19, 1995

BEST AVAILABLE COPY

QUESTIONS PRESENTED

An employee's defamation suit concerning a supervisor's alleged accusation in the course of a workplace investigation was held preempted by the federal Railway Labor Act ("RLA").

1. Where petitioner proposed to meet her evidentiary burden with proof that her supervisor's conduct contravened the collective bargaining agreement covering her employment, is petitioner's claim correctly held preempted under even the narrowest interpretation of preemption under the *Lueck/Lingle/Hawaiian Airlines* standard, such that this case presents no issue worthy of this Court's review?

2. Should this Court accept this case to test the outer parameters of federal labor preemption, notwithstanding the absence of any occasion to do so in light of the New York Court of Appeals' findings that:

(a) "the jury here was required to specifically determine whether defendant's conduct was qualifiedly privileged under the labor contract and whether he exceeded the scope of that privilege";

(b) "plaintiff's theory that defendant's reliance upon his own observations here constituted malice could well be seen as unsustainable in light of the terms of the agreement which permit such conduct";

(c) the jury's verdict "trespassed upon the exclusive authority of the adjustment board to determine the manner in which an employer may enforce company policies";

(d) "plaintiff's tort action constituted a preempted 'disguised' contract claim"; and

(e) "[t]he risk to be avoided by the provisions for the board's exclusive jurisdiction – that a State court ruling may be inconsistent with a Federal adjustment board determination on the same employment issue – is present here"?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF THE CASE 1

A. The Facts 2

B. The Proceedings Below 3

REASONS FOR DENYING THE WRIT 7

A. The Court of Appeals Considered and Its Decision is Fully Consistent With *Hawaiian Airlines, Inc. v. Norris* 7

B. This Case Will Not Resolve Any Perceived Circuit Conflict As Petitioner's Claim Is Preempted Regardless Of The Outer Parameters of the *Lueck/Lingle* Standard 14

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) . . . passim

Anderson v. American Airlines, Inc.,
2 F.3d 590 (5th Cir. 1993) 13

Angio-Medical Corp. v. Eli Lilly & Co.,
720 F. Supp. 269 (S.D.N.Y. 1989) 17

Bagby v. GMC,
976 F.2d 919 (5th Cir. 1992) 15

Barbe v. Great Atl. & Pac. Tea Co.,
722 F. Supp. 1257 (D.Md. 1989),
aff'd, 940 F.2d 651 (4th Cir. 1991),
cert. denied, ___ U.S. ___,
112 S. Ct. 939 (1992) 15

Beard v. Carrollton R.R.,
893 F.2d 117 (6th Cir. 1989) 12

Caterpillar Inc. v. Williams,
482 U.S. 386 (1987) 19, 20

Consolidated Rail Corp. v. Railway Labor Executives' Ass'n,
491 U.S. 299 (1989) 2

Davies v. American Airlines, Inc.
971 F.2d 463 (10th Cir. 1992),
cert. denied, ___ U.S. ___,
113 S. Ct. 2439 (1993) 13

DeCoe v. GMC,
32 F.3d 212 (6th Cir. 1994) 15, 16, 20

Edelman v. Western Airlines, Inc.,
892 F.2d 839 (9th Cir. 1989) 12

Greene v. Alberle,
150 Misc. 2d 306 (Sup. Ct. Suffolk Co. 1991) 17

Gully v. First Nat'l Bank,
299 U.S. 109 (1936) 20

Hawaiian Airlines, Inc. v. Norris,
___ U.S. ___, 114 S. Ct. 2239 (1994) ..... passim

Henegar v. Banta,
27 F.3d 223 (6th Cir.),
cert. denied, ___ U.S. ___,
No. 94-503, 1994 WL 528130 (1994) 12, 16, 20

Horton v. Liberty Mutual Ins. Co.,
367 U.S. 348 (1961) 8

Johnson v. United States,
333 U.S. 10 (1933) 8

Lent v. Huntoon,
143 Vt. 539 (1983) 17

Liberman v. Gelstein,
80 N.Y.2d 429 (1992) 4, 16

Lingle v. Norge Div. of Magic Chef, Inc.,
486 U.S. 399 (1988). ..... passim

Livadas v. Bradshaw,
___ U.S. ___, 114 S. Ct. 2068 (1994) 10

Local 174, Teamsters v. Lucas Flour Co.,
369 U.S. 95 (1962) 17, 18

Maher v. New Jersey Transit Rail Operations, Inc.,
125 N.J. 455 (N.J. 1991) 13

McCormick v. AT&T Technologies, Inc.,
934 F.2d 531 (4th Cir. 1991),
cert. denied, ___ U.S. ___,
112 S. Ct. 912 (1992) 15

Melanson v. United Airlines, Inc.,
931 F.2d 558 (9th Cir.),
cert. denied, ___ U.S. ___,
112 S. Ct. 189 (1991) 12

Mock v. T.G. & Y. Stores Co.,
971 F.2d 522 (10th Cir. 1992) 15, 20

Norwood v. City of New York,
203 A.D.2d 147 (1st Dep't),
appeal dismissed without op., 84 N.Y.2d 849 (1994) ... 17

O'Brien v. Consolidated Rail Corp.,
972 F.2d 1 (1st Cir. 1992),
cert. denied, ___ U.S. ___,
113 S. Ct. 980 (1993) 13

O'Shea v. Detroit News,
887 F.2d 683 (6th Cir. 1989) 20

Pennsylvania R.R. v. Day,
360 U.S. 548 (1959) 18

Railway Labor Executives' Ass'n v. Port Authority Trans-Hudson Corp.,
695 F. Supp. 124 (S.D.N.Y. 1988),
injunction dissolved,
759 F. Supp. 1019 (1990) 2, 3

Rayner v. Smirl,
873 F.2d 60 (9th Cir. 1989) 19

Republic Steel Corp. v. Maddox,
379 U.S. 650 (1965) 10

Skinner v. Railway Labor Executives' Ass'n,
489 U.S. 602 (1989) 2

St. Paul Mercury Indem. Co. v. Red Cab Co.,
303 U.S. 283 (1938) 8

Strada v. Connecticut Newspapers, Inc.,
193 Conn. 313 (1984) 17

Tisdale v. United Ass'n of Journeymen & Apprentices, Local 704,
25 F.3d 1308 (6th Cir. 1994) 20

United Ass'n of Journeymen & Apprentices,
Local No. 57 v. Bechtel Power Corp.,
834 F.2d 884 (10th Cir. 1987),
cert. denied, 486 U.S. 1055 (1988) 20

Whitely v. Warden,
401 U.S. 560 (1971) 8

STATUTES

29 U.S.C. § 185 ..... 5, 19, 20

45 U.S.C. § 151 1

OTHER AUTHORITIES

Restatement, Second, Torts (1977) 16

COUNTER-STATEMENT OF THE CASE

Petitioner was employed by Metro-North Commuter Railroad, and the terms and conditions of her employment were governed by a collective bargaining agreement. (Petition Appendix ("Pet.") 1a) On July 16, 1986, petitioner's department head, respondent Hirsh, called petitioner into his office to discuss her work performance. (Pet. 1a-2a) He suspected petitioner was using drugs because he had seen her acting erratically and had previously observed her give an "incoherent" answer to a co-worker. In the presence of her two immediate supervisors, respondent inquired whether petitioner had a problem and whether she was taking drugs. (Pet. 2a) Although petitioner quickly persuaded respondent that she did not use drugs, and he did not take any action whatever against her, petitioner nonetheless sought redress through the grievance procedures set out by her collective bargaining agreement, and also brought this action for common-law defamation, which respondent unsuccessfully moved to dismiss on the jurisdictional ground that it was preempted by the mandatory arbitration provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"). (Pet. 2a-3a)

Eight years later – after a full trial in which the jury "had to second guess whether respondent Hirsh conducted the investigation of petitioner within the dictates of the labor agreement" (Pet. 8a) on its way to a verdict for petitioner of $1.2 million – the New York Court of Appeals agreed with the intermediate appellate court and affirmed dismissal of the action, concluding that petitioner's defamation claim was essentially a "disguised contract claim" (Pet. 9a) and was thus preempted by federal labor law. (Pet. 8a-9a)

A. The Facts

The grievance that formed the basis for this action arose when respondent Hirsh, pursuant to his duties with respect to "Rule G" – an industry-wide rule prohibiting substance abuse[1] – called petitioner into his office to question her about deteriorating performance he had directly observed (Pet. 1a-2a, A 362-69), and to determine whether she had a problem for which she might receive help from Metro-North's Employee Assistance Program ("EAP").[2] As a supervisor in the Transportation Department, Hirsh was required to enforce Rule G, which included informing his subordinates about Rule G and Metro-North's substance abuse policy and the availability of EAP for help with substance abuse and other problems that might affect an employee's work performance. (A 428-29)

It is longstanding industry practice to rely upon supervisory observation as a means of enforcing Rule G.[3] At Metro-North, this practice is embodied in a written substance abuse policy (A 50) that is part of the collective bargaining agreement

---

[1] *See generally Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 314-15 (1989) ("*Conrail*").

[2] "A___" refers to page numbers of the Appendix submitted in the Court of Appeals.

[3] *See, e.g., Conrail*, 491 U.S. at 315 (Conrail relied "chiefly on supervisory observations to enforce Rule G"); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 607-08 (1989) (Rule G is "enforced, in various formulations, by virtually every railroad in the country"; prior to the use of drug testing, railroads "rel[ied] on observation by supervisors and co-workers to enforce the rule"); *Railway Labor Executives' Ass'n v. Port Authority Trans-Hudson Corp.*, 695 F. Supp. 124, 126-27 (S.D.N.Y. 1988) (practice at PATH and Metro-North is to enforce Rule G by "supervisory observation"), *injunction dissolved*, 759 F. Supp. 1019 (1990).

("CBA") between Metro-North and petitioner's union.[4] The Metro-North policy provides that Rule G is to be enforced in part by supervisory observations of performance and behavior (A 44), inquiries of employees (A 41), and confidential reference to EAP of employees suspected of having a substance abuse problem. (A 41)

Respondent, a manager with 20 years' experience, made certain firsthand observations of petitioner, among them seeing her in a state that he considered incoherent and that one of her own witnesses characterized as "babbling." (A 596) Respondent reviewed his concerns with two other supervisors, who had a different view (although none of the three could be certain), and only then called petitioner into a meeting with those two supervisors to inquire whether she had a problem that might be aided by Metro-North's EAP. Drugs were mentioned only when petitioner repeatedly asked respondent what problem he thought she had. (A 543-44) No one else was present, and respondent made no announcement in the workplace concerning the meeting.

B. The Proceedings Below

(a) Lower Court Proceedings: Following discovery, respondent moved for summary judgment on the ground that, *inter alia*, his alleged statement was qualifiedly privileged under New York common law and that petitioner could not prove malice sufficient to overcome the privilege. The trial court granted that motion, but the Appellate Division reversed and remanded, holding that petitioner had presented sufficient evidence to raise a jury question as to whether respondent had abused the qualified privilege. (Pet. 18a) ("*Harris I*").[5]

---

[4] *See Railway Labor Executives' Ass'n v. Port Auth. Trans-Hudson Corp.*, 695 F. Supp. at 126-27.

[5] As was argued to the appellate courts after trial, in an issue to be resolved on remand should this Court reverse the judgment below, that decision took an unduly broad view of

(continued...)

Respondent then moved – still prior to trial – to dismiss the action on the ground that the claim was a dispute subject to RLA preemption. The trial court denied that motion.

Petitioner had opposed the summary judgment motion by promising to prove at trial, *inter alia*, that Hirsh "did not follow company policy" in making his alleged accusation, and that his "behavior . . was an arrogant abuse of his power as a supervisor . . . . It was reckless in the extreme to make such accusations without legitimate grounds." (A 56) Then, in opposition to the preemption motion, petitioner promised (A 184) that to support her claim that respondent acted with malice,

> [she would] present the following evidence to show that the defendant acted with reckless disregard of her rights: . . . [that Hirsh] made accusations without possessing significant training or experience which would enable him to make such a determination; [and] contravened his company's own policies . . . .

---

[5](...continued)
petitioner's ability to overcome the privilege inconsistent with the New York Court of Appeals' decision in *Liberman v. Gelstein*, 80 N.Y.2d 429 (1992), rendered after the decision in *Harris I*. Harris submitted no evidence showing that Hirsh acted out of spite or ill-will, and she explicitly admitted that she had no reason to believe that Hirsh disliked her prior to or at the time of the discussion. (A 579-80) Nor could the jury properly have found, from the only evidence Harris offered – testimony that he had asked two subordinates for their opinion as to whether Harris used drugs prior to the July 16, 1986 meeting, and that they had responded that they did not believe she did (A 371-72; 666-67; 686-88) – that Hirsh knew that his alleged statement was false, or that he "in fact entertained serious doubt as to" its truth. *Liberman*, 80 N.Y.2d at 438. As a supervisor with many years of experience in evaluating employees, Hirsh was entitled to rely upon his own personal observations of Harris and her work performance.

And petitioner fulfilled these promises: at trial, in order to carry her burden of proving malice, she offered three trial exhibits, all of which related solely to rights and obligations under the collective bargaining agreement: (1) the substance abuse policy itself, which has been deemed part of the collective bargaining agreement (A 326-26); (2) a letter requesting a hearing concerning the alleged slanderous statement pursuant to Rule 52 of her collective bargaining agreement (A 558); and (3) the letter by which she was subsequently informed that her position (and others) had been abolished. (A 587-88)

Given the issues and proof at trial, as framed and presented by petitioner, the jury's verdict can only be understood as deciding – contrary to Metro-North's view of its bargained-for agreement – that Metro-North needed some quantum of suspicion in order to closely question an employee concerning drug use, even in an informal and private meeting with supervisors.

On appeal from judgment upon the jury's verdict, the intermediate appellate court held that Hirsh's motion to dismiss on grounds of RLA preemption should have been granted.

(b) The New York Court of Appeals' Decisions: On petitioner's appeal to the New York Court of Appeals, respondent argued that petitioner's claim was subject to the exclusive jurisdiction of the grievance-to-arbitration provisions of the RLA, which he urged was broader than the test for preemption pursuant to Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, set forth by *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988), and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). Alternatively, respondent argued that the claim was preempted under the *Lueck/Lingle* standard.

The Court of Appeals unanimously affirmed dismissal of the action. Its opinion invoked the broader RLA standard subsequently rejected in *Hawaiian Airlines, Inc. v. Norris*, ___ U.S. ___, 114 S.Ct. 2239 (1994), but also made clear (*see generally* Pet. 8a-9a) that petitioner's claim was preempted even if the

Lueck/Lingle standard applied, as it was substantially dependent on the CBA and indeed was a "disguised contract claim":

- "At the time of the alleged slander, plaintiff was being interviewed regarding her work performance and her possible violation of the substance abuse policy. Thus, the alleged tortious conduct was 'inextricably intertwined' with a work-related investigation that defendant Hirsh was authorized to undertake by the terms of the CBA . . .";
- "Adjudication of plaintiff's State tort claim would have been impossible without reference to conduct governed by the [CBA] since, in rendering its verdict, the jury here was required to specifically determine whether defendant's conduct was qualifiedly privileged under the labor contract and whether he exceeded the scope of that privilege";
- "In finding that defendant did not have the authority under the [CBA] to engage in the exchange with plaintiff in the manner that he did, the jury had to second-guess whether defendant Hirsh conducted the investigation of plaintiff within the dictates of the labor agreement";
- Since "the terms of the Metro-North substance abuse policy authorize a supervisor to proceed with an employee substance abuse investigation by relying 'solely on evidence of . . . personal observations, . . .' plaintiff's theory that defendant's reliance upon his own observations here constituted malice could well be seen as unsustainable in light of the terms of the agreement which permit such conduct"; and
- "The trial record also supports defendant's contention that plaintiff's tort action constituted a preempted 'disguised' contract claim . . . plaintiff interjected into the litigation the claim that she was 'unjustly treated' and ultimately 'forced out' of her position – matters

entrusted to the sole jurisdiction of the adjustment board under the RLA."

Petitioner promptly sought reargument when this Court handed down *Hawaiian Airlines* two weeks after the decision of the Court of Appeals. After receiving respondent's opposition, which demonstrated at length that (as respondent had earlier argued) the *Lueck/Lingle* standard was met, the Court of Appeals denied reargument.

REASONS FOR DENYING THE WRIT

Petitioner has asked this Court to grant the writ and either (a) vacate and remand for consideration in light of *Hawaiian Airlines* or (b) resolve a purported "deep-seated conflict" over the proper scope of federal labor preemption. Neither argument justifies granting the requested writ. The New York Court has already had an opportunity to consider whether its judgment was consistent with *Hawaiian Airlines*, and there is no conflict insofar as cases such as this are concerned, so that this case provides no occasion for exploring the conflict petitioner perceives.

A. The Court of Appeals Considered and Its Decision is Fully Consistent With *Hawaiian Airlines, Inc. v. Norris*

1. The New York Court of Appeals has already given "due deliberation" (Pet. 20a) to petitioner's argument that *Hawaiian Airlines* required reversal of its decision in this case. Thus, there is absolutely no basis for petitioner's suggestion that this Court should grant the writ, vacate the judgment below, and remand for reconsideration in light of *Hawaiian Airlines*. Doing so might have been appropriate had the petitioner come directly to this Court instead of moving the state court for reargument, but that was not the course petitioner chose.[6]

---

[6] Plaintiff's motion for reargument was filed on July 9, 1994, and was met by a brief in opposition on July 22 and additional letter-briefing. The Court of Appeals had more than two

(continued...)

2. In any event, as respondent explained to the Court of Appeals and as that Court's opinion demonstrates, respondent's pre-trial motion to dismiss on the jurisdictional preemption ground was plainly meritorious even under the *Lueck/Lingle* standard applied to RLA cases by *Hawaiian Airlines*, because the petitioner's arguments on the motion made clear that resolution of her claim depended on the reach of respondent's authority under the CBA. As petitioner's own presentation of her claim required interpretation of the CBA, it is clearly preempted by the settled core of *Lueck* and *Lingle*. Thus, this is not an appropriate case to test the outer reaches of the *Lueck/Lingle* doctrine.[7]

---

[6](...continued)
months to deliberate on the motion for reargument predicated on *Hawaiian Airlines* before it denied the motion on September 29, 1994. (Pet 20a)

[7] In this regard, we note petitioner's error in arguing against preemption by relying upon the jury's implicit conclusion that Hirsh acted with either common law or actual malice (*see* Pet. 13) and upon "facts" that were in sharp dispute and not established until the final verdict (*see* Pet. 3-4). Whether the pre-trial preemption motion should have been granted should be analyzed in light of the pleadings and arguments then available, not by the record later made at a trial that had not yet occurred (and if the action were properly one for the RLA adjustment boards, should never have occurred). *Cf. Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348 (1961) (diversity jurisdiction rests on amount which at the outset appears likely to be at issue); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289-90 (1938) (subsequent reduction in amount in controversy irrelevant to jurisdiction); *Johnson v. United States*, 333 U.S. 10, 16-17 (1933) (arrest made without probable cause cannot be justified by fruits of arrest itself); *Whitely v. Warden*, 401 U.S. 560, 564-65 (1971) (validity of arrest or search warrant turns on evidence before magistrate at time of application).

(continued...)

As *Hawaiian Airlines* reaffirmed, and as *Lueck* and *Lingle* had earlier made clear, "where the *resolution* of a state-law claim depends on an interpretation of the collective-bargaining agreement, the claim is pre-empted." 114 S.Ct. at 2248 (emphasis added); *see also Lingle*, 486 U.S. at 405-06; *Lueck*, 471 U.S. at 220.

In *Lueck*, this Court held preempted an employee's state law action for bad-faith mishandling of his disability claim. In that case the manner of handling such claims was not even expressly addressed in the collective bargaining agreement. However, the Court noted that the parties could have bargained about what would constitute "reasonable performance" of their obligations with respect to disability claims, and "[t]he parties' agreement as to the manner in which a benefit claim would be handled will necessarily be relevant to any allegation that the claim was handled in a dilatory manner." 471 U.S. at 218. The state claim was thus "substantially dependent" upon analysis of the terms of the collective agreement and was held preempted. 471 U.S. at 220-21.

---

[7](...continued)

If events at trial are to be considered, we further note that various "facts" set out in the petition, including petitioner's description of her use of the CBA at trial as "incidental," are entirely inaccurate – indeed, the Court of Appeals concluded that the trial record supported the view that petitioner's claim was in actuality a disguised contract claim (Pet. 9a), meaning the contract, *i.e.*, the CBA, could not have been incidental. Petitioner's contention that respondent did not rely at trial on the Metro-North drug policy embodied in the CBA to defend against plaintiff's claim is similarly inaccurate (*see* Pet. 3a), and, moreover, is beside the point. In contending that respondent had never read Rule G and did not knowingly rely on it, petitioner herself argued that respondent had acted outside of his authority, and it was thus petitioner who brought the issue of the reach of the CBA before the jury. (Pet. 8a)

In *Lingle*, by contrast, the Court concluded that plaintiff's retaliatory discharge claim was not preempted because resolution of the claim turned on "purely factual questions" about conduct and motive that did not require interpretation of any term of a collective bargaining agreement. 486 U.S. at 407.

Hawaiian Airlines reaffirmed *Lueck*'s holding that common law claims against employers arising in the workplace *are* preempted where – as here – "the duties the employer owed the employee . . . were rooted firmly in the collective-bargaining agreement," or where "any attempt to assess liability . . . inevitably will involve contract interpretation." *Hawaiian Airlines*, 114 S.Ct. at 2247-48 (quoting *Lueck*, 471 U.S. at 218).[8]

In the course of implicitly accepting respondent's argument that petitioner's claim was subject to preemption under *Lueck*, the New York Court observed that "[t]he substance of [Harris'] claim is that [respondent] falsely accused her of drug use during the July 16 meeting and *failed to comply with the negotiated policies and procedures governing such inquiries.*" (Pet. 8a, emphasis added) Petitioner's claim:

---

[8] As petitioner recognizes (Pet. 16), *Livadas v. Bradshaw*, ___ U.S. ___, 114 S. Ct. 2068 (1994), decided shortly before *Hawaiian Airlines*, likewise emphasized that federal preemption is required wherever necessary to assure that the purposes of the labor laws are not frustrated by "state laws purporting to determine 'questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement,' *Lueck*, 471 U.S., at 211, 105 S.Ct., at 1911, or by parties' efforts to renege on their arbitration promises by 'relabeling' as tort suits actions simply alleging breaches of duties assumed in collective-bargaining agreements, *id.*, at 219, 105 S. Ct., at 1915; *see Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652, 85 S. Ct. 614, 616, 13 L. Ed. 2d 580 (1965)." *Livadas*, 114 S. Ct. at 2078.

> 'in essence and substance' concerned the application or interpretation of company rules embodied in Metro North's CBA. . . . Adjudication of plaintiff's State tort claim would have been impossible without reference to conduct governed by the collective bargaining agreement since, in rendering its verdict, the jury here was required to specifically determine whether defendant's conduct was qualifiedly privileged under the labor contract and whether he exceeded the scope of that privilege.

(Pet. 8a, citations omitted) The Court then stated, in a finding congruent with the determination in *Lueck*, that the jury's verdict "trespassed upon the exclusive authority of the adjustment board to determine the manner in which an employer may enforce company policies" (Pet. 8a), since it would necessarily inhibit (indeed, preclude) Metro-North from exercising the very contractual authority it believes it has under Rule G. To the extent Metro-North's interpretation of its authority to have its supervisors question employees about on-the-job drug use is incorrect, Congress has decreed that it is an adjustment board under the RLA – and not any jury or judge – that should decide whether or not Metro-North's managers may continue to implement Rule G as respondent implemented it.

The Court of Appeals' assessment that resolution of petitioner's claims depended on the CBA was well-founded. The centerpiece of petitioner's opposition to the pre-trial preemption and summary judgment motions (and at trial) was her contention that respondent had not followed Metro-North's policy, and was not authorized to act as he did. *See* pp. 4-5 above. It should have been apparent to the motion court that in considering whether petitioner met her burden of proving malice (fault), the jury would inevitably have to assess and construe the scope of the employer's authority to question employees as respondent did. The burden of proving that the respondent acted with either common law or actual malice rested with petitioner, and she proposed to carry that

burden by showing that the respondent "contravened his company's own policies" (A 184), *i.e.*, the CBA.[9]

Other RLA preemption decisions applying the *Lueck/Lingle* test, which were cited to the New York Court of Appeals on the main appeal, confirm that petitioner's claim is preempted under that standard. *See, e.g., Melanson v. United Airlines, Inc.*, 931 F.2d 558, 562 n.3, 563 (9th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 189 (1991) (claim for fraudulent misrepresentation preempted under *Lingle*); *Beard v. Carrollton R.R.*, 893 F.2d 117, 122 (6th Cir. 1989) (claims for intentional infliction of emotional distress and wrongful interference with contract preempted under *Lingle*); *Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 844 (9th Cir. 1989) (variety of tort claims preempted under *Lingle*). *See also Henegar v. Banta*, 27 F.3d 223, 226-27 (6th Cir.) (presented to the Court of Appeals in opposition to petitioner's reargument motion; defamation claim preempted under *Lingle*), *cert. denied*, ___ U.S. ___, No. 94-503, 1994 WL 528130 (1994).

These cases demonstrate that resolution of claims based on employer statements or actions during a routine investigation

---

[9] Even though petitioner's union never obtained at the bargaining table a provision limiting the extent to which employees would be questioned about drug use or informally accused during questioning absent probable cause, a judgment upholding the verdict would have precisely that effect and would essentially prohibit Metro-North from using the contractual authority it believes it has bargained for when dealing with employees in New York State. Notably, however, and as discussed in greater detail below (at 17-19), that interpretation would only apply in New York, meaning that Metro-North managers in Connecticut could have different authority in applying Rule G, in contravention of the general federal labor policy of promoting uniformity in the interpretation of collective bargaining agreements and the need for uniform substantive standards so that multistate railroads can be efficiently and safely operated.

undertaken pursuant to the terms of a collective bargaining agreement will typically, if not invariably, require analysis of whether the statements fell within the parameters of the employer's authority under the agreement, as was required by the claim here.[10] By contrast, the question in *Hawaiian Airlines* and in the other retaliatory discharge cases is whether the discharge was retaliatory *independent* of any reason or "just cause" for the discharge under the collective bargaining agreement - *i.e.*, the sole issue is the employer's motivation, regardless of what the CBA allowed. *See, e.g., Hawaiian Airlines*, 114 S.Ct. at 2248, 2251; *Anderson v. American Airlines, Inc.*, 2 F.3d 590, 596 (5th Cir. 1993); *Davies v. American Airlines Inc.*, 971 F.2d 463, 466-67 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2439 (1993); and *Maher v. New Jersey Transit Rail Operations, Inc.*, 125 N.J. 455, 472-73, 593 A.2d 750, 758 (N.J. 1991).

Maher, 593 A.2d at 758, which this Court cited with approval in *Hawaiian Airlines*, makes the above distinction clear. In that case, the Supreme Court of New Jersey relied on *Lingle* in holding that a claim for disability discrimination *was* preempted, while at the same time reaching a different conclusion for a retaliatory discharge claim based on the New Jersey whistleblower statute. 593 A.2d at 760 (citations omitted). The employer's defense to the discrimination claim involved the need to comply with a safety rule, and thus resolution of that claim required interpretation of the collective bargaining agreement. *Maher*, 593 A.2d at 763. *See also O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1, 5-6 (1st Cir. 1992), *cert. denied*, ___ U.S.___, 113 S.Ct. 980 (1993) (cited with approval in *Hawaiian Airlines*).

As the New York Court of Appeals recognized in denying reargument, the *Lueck/Lingle* standard applied in *Maher* and in

---

[10] As repeatedly noted, petitioner invoked the CBA in her papers opposing respondent's motions to dismiss on RLA preemption grounds and for summary judgment on qualified privilege grounds, contending that Hirsh had acted in contravention of the authority provided by Rule G.

numerous other cases easily resolves this case without the need for further refinement. Here, as in *Maher*, resolution of petitioner's claim "depends upon" an interpretation of the employer's powers under the collective bargaining agreement, and in

> finding that defendant did not have the authority under the collective bargaining agreement to engage in the exchange with plaintiff in the manner that he did, the jury had to second-guess whether defendant Hirsh conducted the investigation of plaintiff within the dictates of the labor agreement. In so doing, the jury necessarily trespassed upon the exclusive authority of the adjustment board to determine the manner in which an employer may enforce company policies.

(Pet. 8a) In short, the Court of Appeals' judgment is fully consistent with *Hawaiian Airlines*.

B. This Case Will Not Resolve Any Perceived Circuit Conflict As Petitioner's Claim Is Preempted Regardless Of The Outer Parameters of the *Lueck/Lingle* Standard

1. This case does not provide an appropriate occasion to resolve any perceived conflict concerning the scope of the *Lueck/Lingle* standard. Given petitioner's conceded intention to meet her evidentiary burden by proving that her supervisor "contravened his company's own policies" and exceeded "his power as a supervisor" (*see* pp. 4-5 above), her claim is preempted under the narrowest reading of the *Lueck/Lingle* standard suggested by any appellate court.

Indeed, courts applying *Lueck* and *Lingle* to RLA and non-RLA defamation claims by employees against employers based on work-related speech, both before and after *Hawaiian Airlines*, have consistently agreed that such claims are preempted, because in all such cases the petitioner has the burden of proving fault and in that regard will usually – *as petitioner promised to do here* – contend that the defendant acted outside

the scope of any contractually authorized workplace investigatory power. These cases closely parallel the tort claim in *Lueck*, since their resolution is "substantially dependent upon analysis of the terms of" collective-bargaining agreements, 471 U.S. at 220.[11]

---

[11] The RLA cases cited to the New York Court of Appeals holding employee workplace-related defamation claims preempted are discussed at p. 12 above. The many non-RLA cases respondent cited to that Court holding similar claims preempted under the *Lingle/Lueck* standard include *DeCoe v. GMC*, 32 F.3d 212, 217 (6th Cir. 1994) (defamation claim preempted as plaintiff's claim presupposed a duty "incompatible with that established by the CBA"); *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 530 (10th Cir. 1992) (state tort claims, including defamation, preempted under *Lingle* test where claims arose from manner in which employer conducted investigation of suspected employee misconduct); *Bagby v.* GMC, 976 F.2d 919, 921-22 (5th Cir. 1992) (claims for defamation and intentional infliction of emotional distress preempted under *Lingle* where claims asserted that acts taken pursuant to suspension and investigation procedures were tortious by the mere fact that other employees learned of them; cannot use state tort system to prohibit employers from investigating employee misconduct); *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531, 535-37 (4th Cir. 1991) (claims for infliction of emotional distress stemming from employer cleaning out employee's locker preempted under *Lingle* because claims could not be determined without reference to collective bargaining agreement, which governed employer's authority to take such action), *cert. denied*, ___ U.S. ___, 112 S. Ct. 912 (1992); *Barbe v. Great Atl. & Pac. Tea Co.*, 722 F. Supp. 1257, 1260-63 (D.Md. 1989) (defamation claim arising from dissemination of termination letter preempted under *Lingle*), *aff'd*, 940 F.2d 651 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 939 (1992).

(continued...)

There is thus no conflict in the circuits with regard to preemption of defamation claims brought by employees against managers concerning speech uttered in the course of workplace investigations. Indeed, none of the cases to which petitioner approvingly points denies preemption to defamation claims against managerial employees under either the RLA or the LMRA. To the contrary, even the Sixth Circuit, to which petitioner points as having the narrowest, most "claim-centered" analysis, has twice since *Hawaiian Airlines* held defamation claims like the one here preempted under the *Lueck/Lingle* test. *See Henegar v. Banta*, 27 F.3d at 226-27; *DeCoe v. GMC*, 32 F.3d at 217.

The reason for this is simple: resolution of virtually all defamation claims brought by employees against managerial personnel based on managerial speech arising in the course of workplace investigations will depend upon whether employer speech is authorized by the CBA, since the employee-plaintiffs will in most if not all jurisdictions (and certainly in New York[12]) have the burden of proving an unprivileged publication, *e.g.*, fault sufficient to defeat privilege. The claims in such cases will thus not merely involve historical facts, but rather will "depend on" the scope of managerial authority afforded in the collective bargaining agreement.

The burden on plaintiffs to prove fault was recognized by the authors of the influential Restatement, Second, Torts (1977) years ago, when they defined the elements of defamation in § 558 to include "an unprivileged publication to a third party." Whether the cases follow that approach and refer to unprivi-

---

[11](...continued)

Significantly, then, the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits *agree* that tort claims such as that pressed here are preempted under the *Lueck/Lingle/ Hawaiian Airlines* standard.

[12] *Liberman v. Gelstein*, 80 N.Y.2d at 437-38.

leged publication as an element of the tort itself,[13] or whether they speak in terms of privilege as a defense[14] is of no moment, since in all such cases the plaintiff has the burden of defeating the privilege, once it is found presumptively to apply. Thus, regardless of the verbal formulation used, the result is precisely the same: plaintiffs in such workplace defamation cases uniformly shoulder the burden of attempting to defeat the qualified privilege.

Because New York gives plaintiffs the burden of proving that the privilege has been exceeded, and because that allocation will usually (as it did here) lead plaintiffs to prove that any managerial authority afforded by the CBA was exceeded or violated (as petitioner contended below), even the most resolutely "claim-centered" approach to preemption will usually, if not invariably, result in preemption, as recognized by the repeated holdings that employee defamation claims against managerial employees arising out of workplace investigations are subject to resolution under the RLA grievance machinery.

2. The standard urged by petitioner has not been applied in cases like this precisely because it would lead to arbitrary results in contravention of the bedrock principle of federal labor preemption – uniformity in the interpretation of collective bargaining agreements. As this Court first stated in *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) (and quoted in *Lueck*, 471 U.S. at 210 and again in *Lingle*, 486 U.S. at 404):

---

[13] *See, e.g., Angio-Medical Corp. v. Eli Lilly & Co.*, 720 F. Supp. 269, 272 (S.D.N.Y. 1989); *Greene v. Alberle*, 150 Misc.2d 306, 308 (Sup. Ct. Suffolk Co. 1991). *See also Decoe*, 32 F.3d at 217 (6th Cir. 1994) (Michigan law); *Strada v. Connecticut Newspapers, Inc.*, 193 Conn. 313, 316 (1984); and *Lent v. Huntoon*, 143 Vt. 539 (1983).

[14] *See, e.g., Norwood v. City of New York*, 203 A.D.2d 147 (1st Dep't), *appeal dismissed without op.*, 84 N.Y.2d 849 (1994).

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. *Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation* . . . .

369 U.S. at 103-04 (emphasis added).

But conflicting interpretations of collective bargaining agreements is exactly the result that would be obtained were petitioner's formulation the test for labor preemption. The "claim-centered" standard as described by petitioner would remit employees covered by collective bargaining agreements to adjustment boards in states where "unprivileged publication" is the verbal formulation used for a defamation claim, while employees in other states subject to the same agreements with the same standards would nonetheless have recourse to state courts on state defamation claims. Such an erroneous distinction has not been adopted by any circuit.

Such disparate results would be particularly unjustifiable in the context of the RLA, where Congress has emphasized the importance of uniform substantive standards so that multistate railroads can be efficiently and safely operated. *See, e.g., Pennsylvania R.R. v. Day*, 360 U.S. 548, 552-53 (1959). In the RLA context, petitioner's test would also invoke a host of potential choice-of-law issues because railroad employees often spend their working time in more than one state, meaning that preemption could depend on the *situs* of the tort. Allowing state law claims in these circumstances would result

in exactly the "unpredictable medley of jury determinations, which Congress, in its quest for national uniformity" has sought to avoid in the railroad industry. *Rayner v. Smirl*, 873 F.2d 60, 66 (9th Cir. 1989) (construing the whistleblower provisions of the Federal Railroad Safety Act to preempt a state action for wrongful discharge).

In sum, petitioner's proposed standard makes no sense in the context of this case, has not been adopted in any circuit, and provides no occasion for this Court to revisit the same ground it only recently covered in *Hawaiian Airlines*.

3. Petitioner's citation of cases from the Sixth and Tenth Circuits at 11-12 of the petition for the spurious proposition that those circuits take a strictly claim-centered view of LMRA preemption inconsistent with preemption of defamation claims ignores the distinction between *removal*, which bases federal question jurisdiction on the "well-pleaded complaint rule," and preemption, which asks whether resolution of the plaintiff's case will require interpretation of the CBA (regardless of whether or not the complaint itself mentions the CBA). As this Court explained in *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987), an employer's invocation of the CBA by way of defense may be sufficient to warrant a state-court finding of LMRA preemption even though it is not sufficient to warrant removal to federal court:

> It is true that when a defense to a state claim is based on the terms of a collective bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule – that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.

482 U.S. at 398-99; *see also id.* at n. 13.

Petitioner ignores the Sixth and Tenth Circuit cases finding defamation claims involving managerial workplace speech arising in the course of investigations preempted under the *Lingle/Lueck* standard (*see Henegar, DeCoe,* and *Mock,* all cited *supra* at 15-16), and has not shown that any circuit now employs her suggested rule except to determine removal. Indeed, the only Tenth Circuit case cited by petitioner as allegedly refusing to predicate LMRA preemption on a CBA-related defense – *United Ass'n of Journeymen & Apprentices, Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 889 (10th Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988) – decided a removal issue, relied on *Caterpillar*, and presents nothing more than a garden variety application of the familiar well-pleaded complaint rule of *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936). More recent Sixth Circuit decisions than the ones cited by the petitioner agree that "preemption and removal are related but distinct concepts. Even 'the fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted . . . does not establish that they are removable to federal court.'" *Tisdale v. United Ass'n of Journeymen & Apprentices, Local 704*, 25 F.3d 1308, 1311 (6th Cir. 1994) (citing *Caterpillar*, 482 U.S. at 398).[15] Removal principles obviously have no application to the state court's finding of preemption in this case.

Just last term, the Court noted that "[W]here the *resolution* of a state-law claim depends on an interpretation of the collective-bargaining agreement, the claim is pre-empted." *Hawaiian Airlines*, 114 S.Ct. at 2248 (emphasis added), citing *Lingle*, 486 U.S. at 405-406, and *Lueck*, 471 U.S. 202. Nothing in

---

[15] To the extent that *O'Shea v. Detroit News*, 887 F.2d 683 (6th Cir. 1989) does not purport to hinge on removal principles, it stands only for the proposition that a proffered CBA-based defense will not result in preemption where it is irrelevant to resolution of the claim. In *O'Shea*, as in *Lingle* and *Hawaiian Airlines*, discussed at pages 9-10 above, the court found that the relevant issue before the factfinder would be only what the employer's motivation was, not what the CBA allowed.

the petition or the New York Court of Appeals' decision suggest any need to revisit this issue.

CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

CHARLES S. SIMS, ESQ.
Counsel of Record
WENDY H. SCHWARTZ, ESQ.
JEFFREY M. LUBELL, ESQ.
PROSKAUER ROSE GOETZ &
MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3000

RICHARD K. BERNARD,
GENERAL COUNSEL
CAROL S. BARNETT, ESQ.
METRO-NORTH COMMUTER RAILROAD
347 Madison Avenue
New York, New York 10017
(212) 340-2537

New York, New York
January 19, 1994

(3)

Supreme Court, U.S.
FILED
JAN 27 1995
OFFICE OF THE CLERK

No. 94-1097

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOAN V. HARRIS,
Petitioner,

v.

PAUL HIRSH,
Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

---

PETITIONER'S REPLY BRIEF

DANIEL F. MCCARTHY
DANIEL A. MCCARTHY
36 West 44th Street
New York, NY 10036

MITCHELL M. KRAUS
3 Research Place
Rockville, MD 20850

MARK D. SCHNEIDER
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	7

TABLE OF AUTHORITIES

CASES — Page

Allis-Chalmers Corp. v. Lueck, 471 U.S. 702 (1985) 5
Fox v. Parker Hannifin Corp., 914 F.2d 795 (6th Cir. 1990) 6
Hawaiian Airlines v. Norris, 114 S. Ct. 2239 (1994) 1, 2, 6
Hirras v. National R.R. Passenger Corp., 39 F.3d 522 (5th Cir. 1994) 6, 7
Lingle v. Norge Division of Magic Chef, 486 U.S. 399 (1988) 2, 5
Livadas v. Bradshaw, 114 S. Ct. 2078 (1994) 5
Local No. 57 v. Bechtel Power Corp., 834 F.2d 884 (10th Cir. 1987) 6
O'Shea v. Detroit News, 887 F.2d 683 (6th Cir. 1989) 6
Tellez v. Pacific Gas and Electric Co., Inc., 817 F.2d 536 (9th Cir. 1986) 6

STATUTES

Labor Management Relations Act, 29 U.S.C. § 185, *et seq.* ..... *passim*
Railway Labor Act, 45 U.S.C. § 151, *et seq.* ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1097

JOAN V. HARRIS,

Petitioner,

v.

PAUL HIRSH,

Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

---

PETITIONER'S REPLY BRIEF

ARGUMENT

1. a) The one paragraph in Respondent's Brief in Opposition ("Resp. Br.") addressed to our showing that the New York Court of Appeal's decision is inconsistent with this Court's subsequent decision in *Hawaiian Airlines v. Norris*, 114 S. Ct. 2239 (1994), and should be vacated and remanded on that ground is devoid of substance.

Respondent concedes that vacation and remand in the situation here "might [be] appropriate had the petitioner come directly to this Court." Resp. Br. at 7. But respondent asserts that where a petition for rehearing is filed with the lower court to afford that court a chance to correct its subsequently revealed error—and the lower court denies rehearing without opinion—the denial is somehow binding on this Court.

That assertion is so contrary to the basic proposition that lower court decisions on federal questions *never* bind this Court, and to the salutary policy recommending that parties call to a lower court's attention an error revealed by a later decision of this Court so as to give the lower court a *locus penitentiae,* as to be frivolous.

b) As to respondent's vague suggestion that the text of the New York Court's decision refutes our claim that the decision rests on the broad Railway Labor Act "labor contract" preemption doctrine discredited in *Hawaiian Airlines,* it suffices, we believe, to quote that court's words most directly in point:

> Along with a number of courts that have addressed the issue, we conclude that the preemptive effect of the RLA is more pervasive than the preemptive effect of the Labor Management Relations Act, 29 U.S.C. § 185 *et seq.* . . . Accordingly, we reject plaintiff's claim that the test for preemption under section 301 of the LMRA (29 U.S.C. § 185) established in *Lingle v. Norge Div. of Magic Chef* (486 U.S. 399 [1988]) . . . governs this case. [Pet. App. 6a-7a.]

As we demonstrated in our opening submission, this holding simply cannot stand in light of *Hawaiian Airlines,* which holds that "*Lingle* provides the appropriate framework for addressing preemption under the RLA, and we adopt the *Lingle* standard to resolve claims of RLA preemption." 114 S.Ct. at 2249.

2. Respondent's principal argument is that "petitioner's claim [was] correctly held preempted under even the narrowest interpretation of preemption under the *Lueck/Lingle/Hawaiian Airlines* standard." Resp. Br., First Question Presented. This argument is fashioned out of bits and shards that misrepresent the facts of this case and misstate the law.

a) Respondent asserts that this case is in substance a breach of contract action disguised as a tort suit, the kind of case that presents the most straightforward need for labor contract preemption. Specifically, respond-

ent asserts that this case is a "grievance" about whether a Metro-North supervisor was within his authority and acted "pursuant to his duties with respect to 'Rule G,' an industry-wide rule prohibiting substance abuse," Resp. Br. at 2, when he called petitioner into his office based on his suspicion that she was abusing drugs. And, respondent concludes, "the jury's verdict can only be understood as deciding . . . that Metro-North needed some quantum of suspicion in order to closely question an employee concerning drug use" under Rule G. Resp. Br. at 5.

In each particular, these factual representations are made of whole cloth. There was a trial and there is a trial transcript. And the following is all beyond dispute: At trial the plaintiff did *not* accuse the defendant of violating contractual (or, for that matter, unilaterally imposed) rules about drug abuse or supervisory authority. At trial, the defendant *never* defended his conduct on the ground that he was following contractual or company rules. At trial, the "longstanding industry practice to rely upon supervisory observation as a means of enforcing Rule G," Resp. Br. at 2, was *not* the subject of any testimony. To the contrary, at trial, Rule G itself was *never* discussed or even mentioned, and the charge to the jury contained *not* a single reference either to Rule G, Metro North's substance abuse policy, or the labor agreement in place between Metro North and petitioner's union.

Harris' case was *not* that her rights under her labor agreement, or unilaterally imposed company policy, had been violated, but that Hirsh maliciously made false and slanderous allegations against her in the presence of other people. Far from being the "centerpiece" of Harris' trial strategy, Resp. Br. at 11, at trial a grand total of *one question* was taken up with the subject of the relationship between Hirsh's slanderous statements and the labor agreement. And, in response to that one question, Hirsh testified that he was not familiar with the relevant portions of the agreement. The subject was not raised again in the testimony, the jury instruction or in the closing arguments.

By the same token, Hirsh's defense at trial was *not* that he "suspected petitioner was using drugs," Resp. Br. at 1, and was merely following Rule G when he called Harris into his office. To the contrary, his defense was that he did *not* suspect her of drug use, and that he never made the slanderous comments attributed to him by Harris. Trial Transcripts A-367, A-324-327.

In sum, respondent's asservations to the contrary, this was no more a contract case in substance than it was in form. It was a run of the mine defamation action, albeit one that was set in the workplace, and in particular in a unionized workplace.

b) Respondent's opposition—to the extent it is not grounded on a mischaracterization of the facts—is grounded on the equally profound mischaracterization of the governing federal law adopted by the New York Court of Appeals. It is that legal error that generates that court's conclusory statements set out at such length at Resp. Br. at 6. And it is that legal error that has generated the deep division in the lower courts that can only be closed by review in this Court.

The style of the theory on the other side is this: A labor agreement gives the company through its supervisory personnel certain rights. Where a state law tort case concerns the exercise of such rights, the outcome must turn "on the reach of defendant's authority under the [labor agreement]." Resp. Br. at 8. For that reason alone, it is argued, the outcome of such cases is "inextricably intertwined" with labor contract questions, and so "clearly preempted by the settled core of *Lueck* and *Lingle*." *Id.* *See also id.* at 11, 14. Or, as the New York Court put it, a state law tort case is fundamentally contractual where "in rendering its verdict, the jury . . . was required to specifically determine whether defendant's conduct was qualifiedly privileged under the labor contract, and whether he exceeded the scope of that privilege." Pet. App. 8a.

This method of approach, respondent argues, is what brings the case snugly within the rule of *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), and *Lingle, supra.* In fact, *Lueck* and *Lingle reject* any such approach.

If state law *unqualifiedly* outlaws *malicious* slanders, as does the law of New York and every other state of which we are aware, we submit it is entirely irrelevant for "labor contract" preemption purposes whether a labor agreement might or might not purport to "privilege" the conduct. As this Court said in *Lueck* the federal law of collective bargaining does "not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law." 471 U.S. at 212.

Federal labor law, we submit, no more affirmatively protects malicious slanders in the workplace—whatever the wording of a labor agreement—than it protects other wrongful and illegal tortious conduct in that setting. And once the contrary—false—predicate of respondent's position is exposed, nothing is left of respondent's argument that this petition should be denied because this case is fundamentally contractual.[1]

c) Respondent's final argument against review is that there is no circuit conflict concerning "labor contract" preemption, this Court's recent statement to the contrary notwithstanding. *See Livadas v. Bradshaw,* 114 S. Ct. 2068, 2078, n.18 (1994).

---

[1] We hasten to add that in evaluating whether a plaintiff has established malice, as in any other inquiry involving motive, the fact-finder might consider arguments that the defendant was motivated by some other, proper, purpose, in publishing his remarks. In a unionized workplace, a defendant might well claim that he was motivated solely by a desire to follow the labor agreement (although in this case Hirsh did not so claim). But as this Court held in *Lingle,* such reference to the labor agreement does not require preemption, because collateral use of the labor agreement to help prove proper motive is a "purely factual inquiry [that] does not turn on the meaning of any provision of a collective-bargaining agreement." 486 U.S. at 407.

First, respondent asserts that the Sixth and Tenth Circuit cases upon which we relied are inapposite because all are removal cases, and not preemption cases. *See* Resp. Br. at 19-20. This is simply not so; each of the cases we cite is a preemption case.[2]

Second, respondent asserts that in any event there is no split involving *defamation* torts. Resp. Br. at 16, 18. This assertion is both untrue and irrelevant. In *Tellez v. Pacific Gas and Elec. Co., Inc.*, 817 F.2d 536 (9th Cir. 1986), the Ninth Circuit found *not* preempted a state law libel suit brought by a unionized employee against his employer alleging that the employer's supervisors defamed him by falsely accusing him of drug use. That court held that "one can sue for defamation regardless of employment status or union membership." *Id.* at 538.

At least equally to the point, respondent never explains why *defamation* claims comprise a separate class for this purpose rather than being one part of the larger class of organized-employee-state-tort-claims that most certainly has generated conflict and confusion in the lower court law.

At the risk of belaboring the obvious, the holding of the most recently decided federal court of appeals case in this area could not be more inconsistent with the holding of the New York Court here. In *Hirras v. National R.R. Passenger Corp.*, 39 F.3d 522 (5th Cir. 1994), after a remand from this Court for reconsideration in light of *Hawaiian Airlines, supra*, the Fifth Circuit held that an intentional infliction of emotional distress claim is *not* preempted by the Railway Labor Act. The em-

---

[2] *See O'Shea v. Detroit News*, 887 F.2d 683, 687 (6th Cir. 1989) ("because the plaintiff's claims are independent of the contract, they are not preempted"); *Fox v. Parker Hannifin Corp.*, 914 F.2d 795, 801 (6th Cir. 1990) ("the tortious interference with contracted relations claim falls beyond the preemptive reach of section 301"); *Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 890 (10th Cir. 1987) ("we hold that plaintiffs' blacklisting claims are not preempted by § 301 of the LMRA").

ployer there argued unsuccessfully that the claim should be preempted because proving "extreme and outrageous" conduct "turns on what standard [the employer's supervisors] were expected to meet under the CBA." 39 F.3d at 527. That argument is on all fours with the argument that the court below *adopted* in the instant case, *viz.* that a finding of malice turns on what standard was expected under the labor agreement. And in *Hirras*, the Fifth Circuit rejected the employer's argument, concluding that so long as "the claim is brought under state law without any reference to the CBA, then it is not preempted." *Id.* at 526. That decision is squarely in conflict with the New York Court's decision in the instant case.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DANIEL F. MCCARTHY
DANIEL A. MCCARTHY
36 West 44th Street
New York, NY 10036

MITCHELL M. KRAUS
3 Research Place
Rockville, MD 20850

MARK D. SCHNEIDER
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390